

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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**THE CONSULTATIVE REPORT  
TO THE FEDERAL COMMUNICATION COMMISSION  
FROM THE ILLINOIS COMMERCE COMMISSION  
IN THE MATTER OF THE INVESTIGATION  
CONCERNING ILLINOIS BELL TELEPHONE  
COMPANY'S COMPLIANCE WITH SECTION 271 OF  
THE TELECOMMUNICATIONS ACT OF 1996**

**WC DOCKET NO. 03-167**

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August 6, 2003

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**I. EXECUTIVE SUMMARY**

**A. Introduction**

On July 17, 2003, Illinois Bell Telephone Company d/b/a SBC Illinois<sup>1</sup> ("Ameritech Illinois", "SBC", "SBC Illinois" or "Company"), filed an application with the Federal Communications Commission ("FCC") for authority to provide in-region interLATA services in Illinois pursuant to Section 271(d)(1) of the Telecommunications Act of 1996<sup>2</sup> ("1996 Act"). The FCC issued a Public Notice of this filing on July 17, 2003.

Before making its determination on any 271 application, the FCC is required, in part, to consult with the relevant state commission in order to verify that the subject applicant has one or more state-approved interconnection agreements with a facilities-based competitor, or a Statement of Generally Available Terms and Conditions, and that either the agreement(s) or the general statement, satisfy the Act's "competitive checklist" as set out in Section 271 (c). 47 U.S.C. section 271 (d)(2)(A). This report of the Illinois Commerce Commission ("ICC") is being provided to the FCC in consultation on the Section 271 application filed by SBC Illinois.

**B. Procedural History**

SBC is the only Bell Operating Company ("BOC") currently serving Illinois customers. Back in 1996, SBC Illinois (then d/b/a "Ameritech Illinois") gave

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<sup>1</sup> Illinois Bell Telephone identified itself in its pleadings as Ameritech Illinois during Phase I, and SBC Illinois in Phase II.

<sup>2</sup> 47 U.S.C. §§251-261.

indication of a Section 271 application, such that the ICC initiated an investigation in ICC Docket No. 96-0404 at that time. Subsequently, Docket No. 96-0404 was terminated when Ameritech Illinois decided to postpone this initial plan to seek Section 271 authority.

In September of 2001, SBC indicated its intent to pursue a Section 271 application before the FCC. On October 24, 2001, the ICC initiated Docket No. 01-0662, to investigate the status of SBC's compliance with Section 271 of the 1996 Act. Initiating Order, ICC Docket 01-0662 (October 24, 2001). Notice went out to all carriers certificated pursuant to Section 13-405 of the Illinois Public Utilities Act ("PUA"). Given the importance of determining SBC's ability to comply with the "competitive checklist" described in section 271, the ICC set out to examine whether SBC satisfied the requirements set forth therein, or whether further action was required on SBC's part. The ICC considered it appropriate to conduct its investigation in two separate phases. Phase I addressed as many of the competitive checklist item issues as possible, absent OSS test results and certain public interest concerns. Phase II considered the remaining OSS issues, further disputes not addressed in Phase 1, those matters that the ICC determined in Phase 1 to require further action by SBC, along with the Company's proposed performance assurance plan.

At the outset and on November 20, 2001, SBC Illinois served its Checklist Informational Filing upon the parties. This filing provided, in draft form, the affidavits and brief that the Company intended to submit to the FCC in its 271 filing. The following parties participated in either one or both phases of this proceeding: AT&T Communications of Illinois, Inc., TCG Chicago, TCG Illinois, TCG St. Louis (collectively "AT&T"); McLeodUSA Telecommunications Services Inc. ("McLeod" or McLeodUSA); TDS Metrocom, Inc. ("TDS"); RCN Telecom Services of Illinois, Inc. ("RCN"); XO Illinois Inc. ("XO"); WorldCom, Inc. ("WorldCom"); Z-Tel Communications, Inc. ("Z-Tel"); CIMCO Communications, Inc. ("CIMCO"); Forte Communications ("Forte"); the People of the State of Illinois ("AG"); and Cook County State's Attorney's Office ("Cook County").<sup>3</sup> The Staff of the ICC actively participated in both phases of the proceeding by filing testimony, affidavits, comments, briefs, briefs on exceptions and draft proposed orders.

Workshops to identify Phase I issues were held in January 2001, and pre-filed testimony<sup>4</sup> was circulated between January 28, 2002 and June 5, 2002. An evidentiary hearing was held from June 17-21, and July 1, 2002. On, or about, July 24, 2002, and August 28, 2002, initial and reply briefs were filed, respectively. The Administrative Law Judge issued a Proposed Interim Order on December 6, 2002. Thereafter Briefs on Exceptions and Reply Briefs on Exceptions were filed, and the ICC's Phase I Interim Order on Investigation was entered on February 6, 2003.

On January 17, 2003, SBC served the parties with evidentiary affidavits

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<sup>3</sup> Final Order on investigation, Docket 01-0662 (dated May 13, 2003) at ¶¶9-11, 13,22-33 (hereinafter cited to as "Order").

<sup>4</sup> Generally, the "parties" filing testimony and briefs in Phase I were Ameritech Illinois, WorldCom, AT&T, Z-Tel, McLeodUSA, TDS, RCN, XO, AG and Cook County.

addressing Phase II issues, and the results of an independent audit of SBC Illinois' Reported Performance Results performed by Ernst & Young, LLP. SBC also submitted three months of data reflecting its actual performance for the months of September through November 2002. The Phase II schedule was approved by ICC action on January 30, 2003. In accordance therewith, a series of transcribed workshop meetings<sup>5</sup> were held on February 5, and 10-13, 2003. Representatives from BearingPoint and E&Y participated as witnesses, answering questions on the development of their respective reports. In addition, SBC witnesses who had prepared affidavits on Phase II issues were also questioned during the workshop meetings.

Subsequent to the workshop meetings, parties<sup>6</sup> provided initial Comments on or about February 21, 2003. Reply Comments from SBC were served on March 3, 2003, and the parties served their Rebuttal Affidavits on March 12, 2003. On March 13, 2003 SBC provided its Surrebuttal Comments and Affidavits and Staff served and filed Comments. Briefs and Draft Proposed Orders were filed on March 25, 2003. Pursuant to a March 26 status hearing, all parties were directed to formally file their respective Phase II comments and affidavits and other agreed-upon documents. Subsequent to that hearing, the parties filed the requested documents, and the record was marked "heard and taken" on April 28, 2003. The Administrative Law Judge issued a Proposed Final Order on April 8, 2003. Parties filed Briefs on Exceptions on April 18, 2003, and SBC filed a Reply to Briefs on Exceptions on April 22, 2003.

The Final Order on Investigation ("Final Order") for Docket No. 01-0662 was issued on May 13, 2002, and it combined the evidence, issues and arguments presented in Phase II with the Phase I Interim Order. All total, the Final Order covered all of the issues and showings of record and addressed in both the Phase I and the Phase II proceedings.

Thereafter, on June 5, 2003, an Application for Rehearing was jointly filed by AT&T, McLeod, TDS Metrocom and WorldCom. In this pleading, the Applicants alleged the need for a "price squeeze analysis" owing to the ICC's expected implementation of newly enacted sections 13-408 and 409 of the PUA. It was further argued that the Bill Auditability and Dispute Resolution Plan (See Checklist Item 2) that SBC committed to implement in Illinois, was somehow inadequate and that the Applicants had some proposals to present on the matter.

The Rehearing Application was denied on both counts. The ALJ's memo informed that on June 9, 2003, the United States District Court preliminarily enjoined the implementation of Sections 13-408 and 13-409.

### **C. The ICC's Recommendation**

In Docket No. 01-0662, the ICC was intent on collecting and evaluating all information necessary and relevant to its task of providing the FCC with a

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<sup>5</sup> The witnesses were sworn and subject to questioning by Staff and all interested parties.

<sup>6</sup> Generally, the "parties" filing affidavits, comments and briefs in Phase II were SBC Illinois, WorldCom, AT&T, Z-Tel, McLeodUSA, TDS, CIMCO and Forte.

credible and comprehensive consultative report in these premises. The massive record that the ICC assembled, and the depth and breadth of its Final Order, bear testament to its efforts.

Upon consideration of all the evidence, affidavits, comments, briefs, and briefs on exceptions filed in this proceeding, the ICC here concludes that SBC satisfies Section 271(c)(1)(A) of the 1996 Act, is in substantial compliance with checklist items (i) through (xiv) of Section 271(c)(2)(B), and that SBC's provision of interLATA services in Illinois is consistent with the public interest, convenience and necessity.<sup>7</sup>

Having noted relatively few deficiencies related to checklist items (ii) and (iv), the ICC's Final Order had directed specific remedial actions to remedy those shortcomings. The ICC has made known that its endorsement of SBC's application is expressly conditioned on SBC's willingness to implement, as per its commitments, each and all of the actions that are identified in the Final Order for ICC Docket 01-0662. See Final Order, Attachment A (SBC Illinois' Commitment Progress). As duly indicated in our Final Order the ICC's monitoring of SBC corrective actions is and will be continuing such that the ICC is prepared to take the appropriate actions, under state and federal law, if there is a failure on SBC Illinois' part to fully satisfy the commitments the ICC had directed.

Notably, in the Bi-Monthly Progress report for Docket No. 01-0662, filed by SBC Illinois on June 30, 2003, shows most of the Company's corrective actions are already in progress, and either proceeding on schedule or have been completed.<sup>8</sup>

The performance assurance plan was a weighty matter in the ICC's final assessment, and it found that the Company's proposed plan, as modified by the Final Order, to satisfy the criteria the FCC has set forth in its prior 271 orders. See Part V of this Report. SBC Illinois accepted all of the ICC's modifications and has tariffed the ICC-approved Plan. The ICC's extensive public interest analysis took account of state law disputes and a number of proposals freely put forth by the parties. Id. This assessment, now offered to the FCC, further supports the ICC's recommendation that SBC Illinois be granted the Section 271 authority it seeks.

This report is largely based upon the evidence assembled in Docket No. 01-0662, and related proceedings in other ICC dockets. The remaining sections set out the specifics of the ICC's review of the 14-point checklist of Section 271(c)(2)(B), our analysis of the Company's performance data and its reliability, our review of the performance assurance plan, and our assessment of Track A compliance.

In addition, given that SBC is currently taking corrective actions directed by the ICC in its Final Order for Docket No. 01-0662, information that updates SBC Illinois' continuing progress on these matters is also being presented. See Attachment A to this Report (showing that a large majority of commitments by the

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<sup>7</sup> See Order at ¶¶3600-3612.

<sup>8</sup> See Attachment "A"

Company are completed, with the next reporting on the remaining matters scheduled for filing on August 30, 2003). The updated information as summarized in Attachment A was not part of the record in Docket No. 01-0662, and thus did not factor into the ICC's evaluation at the time its Final Order was entered in that proceeding. It is, however, relevant to establishing the ICC's continued oversight and adds to its endorsement of the SBC Illinois application at hand.

## **II. PERFORMANCE DATA RELIABILITY**

### **A. Background**

To ensure that the evaluation of a BOC's compliance with individual checklist items is reasonable, the FCC and Department of Justice have emphasized the importance of meaningful, accurate, and reproducible performance data.<sup>9</sup> In the ICC's investigation, SBC Illinois submitted three consecutive months (September, October, November 2002) of commercial performance data results ("PM data") to demonstrate that the level of service SBC Illinois provides to Illinois competitive local exchange carriers ("CLECs") is nondiscriminatory. The Company reported PM data on a monthly basis to help CLECs and the ICC monitor SBC Illinois performance, and ensure that SBC Illinois' performance will not diminish once the Company is granted 271 approval. Staff and other parties reviewed SBC Illinois' PM data to determine whether its actual performance complied with the section 271 checklist items. Analysis of that PM data is provided under each checklist item as discussed herein.

The focus of the analysis was on three main items (i) the BearingPoint December 20, 2002 Performance Metric Report ("Interim PM Report"); (ii) the Ernst & Young Performance Measurement Examination (based on the March-May, 2002 period); and, (iii) the sources that offer additional assurances of reliability, i.e., the FCC-sponsored mechanisms.

The ICC hired BearingPoint as an independent third-party, pursuant to the ICC's *SBC Illinois/Ameritech Merger Order*,<sup>10</sup> to monitor and assist in the Operations Support System ("OSS") implementation process, and to test the deployment of the OSS improvements. In addition to BearingPoint's investigation, SBC Illinois retained Ernst & Young ("E&Y") to audit its systems and provide a Performance Measurement Examination Report (reviewing performance data from March through May 2002). BearingPoint evaluated the PMs and standards contained in SBC Illinois' tariff, filed with the ICC on February 25, 2002, and effective as of April 12, 2002, (hereinafter, "February 2002 Tariff")<sup>11</sup>. A six-month collaborative meeting between SBC Illinois and CLECs operating in SBC Illinois' Midwest Region<sup>12</sup> concluded in early 2003 with a few

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<sup>9</sup> *New York Order*, ¶11; *Connecticut Order*, ¶7; *Texas Order*, at ¶428.

<sup>10</sup> ICC Docket No. 98-0555 at §VI.B.29.

<sup>11</sup> ICC Docket No. 01-0662, SBC Illinois Exhibit 2.0, Phase II, at ¶23.

<sup>12</sup> The states in SBC Illinois' Midwest Regions are -- Illinois, Indiana, Michigan, Ohio, and

unresolved issues related to performance measures. The parties brought those unresolved issues before the ICC for resolution, in conjunction with the ICC's investigation of SBC Illinois' compliance with the requirements of section 271. The ICC addressed the unresolved matters<sup>13</sup>, and anticipates the tariff to be updated within the second or third quarter of 2003.

The February 2002 Tariff included 150 performance measures, disaggregated into over 3000 sub measures. Performance measures provide standards for pre-ordering, ordering, provisioning, maintenance and repair, 911, billing, collocation, interconnection trunks, operator services, directory assistance, bona fide requests and miscellaneous administrative issues.

## **B. Standards for Review**

According to the FCC, performance measures should cover a range of interconnection services, should include pre-defined performance standards, and should include clearly articulated business rules<sup>14</sup>. The FCC has also emphasized reliability of reported data, by requiring RBOCs to demonstrate results that are meaningful, accurate, and reproducible.<sup>15</sup> Further, the RBOC must demonstrate that it stores the raw data underlying its performance measurements in a "secure, stable and attainable file."<sup>16</sup> The FCC found that third-party audits and the availability of dispute resolution procedures serve as additional checks on the reliability and accuracy of performance measurement data. However, in its Georgia 271 order, the FCC also indicated that "we cannot as a general matter insist that all audits must be completed at the time a section 271 application is filed at the Commission."<sup>17</sup> In the same 271 order, the FCC indicated that "[c]onsistent with the recommendation of the Department of Justice, however, where specific credible challenges have been made to the BellSouth data, particularly with respect to checklist items 1, 2 and 4, we will exercise our discretion to give that data lesser weight, and [as] discussed more fully below, look to other evidence to conclude that Bell South has met its obligations under section 271."<sup>18</sup>

## **C. Summary of the Evidence**

### **1. BearingPoint Review**

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Wisconsin.

<sup>13</sup> Order, at ¶¶3587-94.

<sup>14</sup> The "business rules" describe and define the performance measurements in place, which SBC Illinois and interested parties use to monitor SBC Illinois' operations. Each performance measurement has its own business rule document, which includes both a general and a technical definition of the measurement, the levels of reporting or disaggregation, the exclusions to the measurement, the calculation details, the specific standard being applied (party or benchmark) and any remedy aspect information. The compilation of the business rule documents for each of SBC Illinois' performance measurements are in effect SBC Illinois' business rules.

<sup>15</sup> Texas Order, at ¶428.

<sup>16</sup> Id.

<sup>17</sup> Georgia/Louisiana Order, ¶19.

<sup>18</sup> Id. at ¶20.

BearingPoint began its investigation of SBC Illinois' performance measurements in November 2000, and issued reports in December 2002, and May 2003. Pursuant to the ICC's *SBC/Ameritech Merger Order*, BearingPoint was required to conduct a "New York" style test – otherwise known as test-until-pass. BearingPoint's next report is due in November 2003 and testing will continue until SBC Illinois passes all of the testing criteria set forth in the Master Test Plan (MTP). The MTP was initially issued on March 30, 2002, and was updated on May 2, 2002. Under the MTP, BearingPoint evaluated the key business functions – ordering, provisioning, billing, maintenance and repair, and account management.<sup>19</sup> BearingPoint's evaluation tested SBC Illinois' OSS, and reviewed SBC Illinois' processes to determine whether the performance measurements are accurately and reliably processed.<sup>20</sup>

At the ICC's request, BearingPoint presented the results of its December 20, 2002 interim report in two parts. The first part reported on the operational aspects of the test, including transaction verification and validation ("TVV"), and processes and procedures reviews ("PPR"). The second part included a review of the performance metrics.<sup>21</sup>

BearingPoint identified an issue or problem as either an "observation" or an "exception." BearingPoint identified a test as an observation if it determined that a test indicated one of SBC Illinois' practices, policies, or system characteristics might result in a negative finding. BearingPoint identified a test as an exception if it determined that a test indicated that a practice, policy, or system characteristic failed to satisfy one or more of the evaluation criteria defined for the test.

The BearingPoint performance metrics review contained five discrete tests:

- [1] data collection and storage verification and validation review (PMR1);
- [2] metrics definitions and standards development and documentation verification and validation review (PMR2);
- [3] metrics change management verification and validation review (PMR3);
- [4] metrics data integrity verification and validation review (PMR4);
- [5] metrics calculations and reporting verification and validation review. (PMR5)<sup>22</sup>

Each of the five performances tests included evaluation criteria, which are the norms, benchmarks, standards, and guidelines used to evaluate the measures identified in the MTP. Each evaluation criterion was analyzed individually and given a result of: satisfied; not satisfied; indeterminate; or not applicable.

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<sup>19</sup> *Id.* at 6.

<sup>20</sup> BearingPoint, OSS Evaluation Project Report: Performance Metrics Report, vol. 1 at 5 (Dec. 20, 2002)

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.* at 13-33.

Table 1 summarizes the results of the Interim PM Report. As shown in Table 1, over 76% (208 of 271) of the evaluation criteria were still in the process of being evaluated at the time BearingPoint issued its Interim PM Report.

**Table 1 – BearingPoint December 20, 2002 Performance Metrics Results<sup>23</sup>**

Test Family	Number of Evaluation Criteria				
	Satisfied	Not Satisfied	Indeterminate	Not Applicable	Total
Performance Metrics Reporting (All 5 tests)	63 20.8%	117 38.6%	91 30.0%	32 10.6%	303 100.0%

**(a) More Recent Post-Investigation Performance Metrics Report**

The most recent report issued by BearingPoint contains results as of May 1, 2003. The following table summarizes those results:

**Table 2 – BearingPoint May 1, 2003 Performance Metrics Results<sup>24</sup>**

Test Family	Number of Evaluation Criteria				
	Satisfied	Not Satisfied	Indeterminate	Not Applicable	Total
Performance Metrics Reporting (All 5 tests)	143 47.3%	7 25.2%	51 16.9%	32 10.6%	302 <sup>25</sup> 100.0%

**(b) SBC Response to Bearing Point Review**

Since BearingPoint had not completed its test, SBC Illinois argued that BearingPoint's Interim PM Report findings are insufficient to warrant a finding of non-compliance. SBC Illinois stated that testing is ongoing, that it will continue to work with BearingPoint, and that it does not intend to request the testing be terminated.<sup>26</sup>

<sup>23</sup> BearingPoint, OSS Evaluation Project Report: Performance Metrics Report, vol. 1 at 8 (December 20, 2002); Order, at ¶2742.

<sup>24</sup> BearingPoint, OSS Evaluation Project Report Performance Metrics Update, dated May 1, 2003.

<sup>25</sup> One PM was removed from the count – PMR 3-16 b/c – since it was redundant with other criteria.

<sup>26</sup> Order, at ¶¶2613-14; for additional detail explanations support see ¶¶2615-20.

## 2. Ernst & Young Performance Metrics Audit

SBC Illinois hired E&Y to conduct a separate and independent audit of SBC Illinois' compliance with the business rules, and of the accuracy and reliability of SBC Illinois' PM reporting systems and processes, so as to supplement the record.<sup>27</sup> E&Y audited SBC Illinois' PM data for the months of March–May 2002. E&Y's "Scope and Approach" document explained that E&Y would provide two reports documenting two attestation examination engagements: (1) "Attestation Examination of the Accuracy and Completeness of [SBC Illinois'] Performance Measurements for the Months of March, April and May 2002"; and (2) "Attestation Examination of the Effectiveness of Controls over [SBC Illinois'] Process to Calculate Performance Measurements for the Months of March, April and May 2002."<sup>28</sup> E&Y conducted these examinations in accordance with the Attestation Standards established by the American Institute of Certified Public Accountants.

E&Y performed its evaluation on a five state basis, and the evaluation covered all 150 Performance Measurements, as contained in Version 1.8 of the Business Rules. The testing approach included: (1) documentation of the process and controls to capture, calculate, and report each performance measurement, (2) site visits and testing of processes to capture PM data, (3) program code review, which entails reviewing the "code" in SBC Illinois' computer programs to determine business rules are appropriately applied, and (4) transaction testing, which is a statistical sampling of transactions for each performance measurement category to verify that raw data from the source systems was appropriately processed and captured in the PM reporting files.

### (a) E&Y Exceptions

E&Y identified 128 exceptions of material noncompliance during its testing and reported its results as of January 17, 2003. E&Y classified the exceptions into the following five categories:

- **Category I:** Corrected, With Restatement of March-May Results.
- **Category II:** Corrected After May 2002, But March-May 2002 Results Not Restated.
- **Category III:** Corrected But Not Yet Reported.
- **Category IV:** No Corrective Action Planned.
- **Category V:** Corrective Action Planned, But Not Yet Implemented as of January 17, 2003.

The following table summarizes the findings reported in E&Y's audit report, dated January 17, 2003:

**Table 3 – E&Y Exceptions of Material Noncompliance as of January 17, 2003**

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<sup>27</sup> Docket No. 01-0662, Affidavit of James Ehr on behalf of SBC Illinois, dated Jan 17, 2003, at ¶216 (filed on April 10, 2003).

<sup>28</sup> See Order at ¶2598-2600.

	Exception Categories					
	I	II	III	IV	V	ALL
Number of Exceptions	53	51	2	7	15	<b>128</b>
Number of Performance Measures Impacted by one or more Exception	75	72	5	10	44	<b>113</b>
% of All Performance Measures Impacted	50%	48%	3%	7%	29%	<b>75%</b>
Number of Performance Measures Impacted by Exceptions	211	137	5	11	50	<b>414</b>
Average Number of Exceptions Per Performance Measure Impacted	4	2.7	2.5	1.6	3.3	<b>3.2</b>

As shown in Table 3, E&Y identified 128 exceptions of material noncompliance with the tests it conducted. Categories I and II reflect 104 exceptions that SBC Illinois has corrected, therefore the only categories requiring explanation are those in Categories III, IV and V. There were two exceptions that were “Corrected But Not Yet Reported” (Category III). The first exception related to the fact that certain product codes were classified as “unknown” and thus was not included in the results for certain PMS<sup>29</sup>. The second exception related to retail billing errors that were corrected, but not included in the retail analog results for billing accuracy. SBC Illinois stated that inclusion of the errors in the retail results would only improve the “parity” between its wholesale and retail performance.

There were seven Category IV exceptions (No Corrective Action Planned). SBC Illinois stated that the seven (7) exceptions did not require any corrective action, either because they were one-time occurrences, or because there was no error in the performance measure.

SBC Illinois has developed a corrective action plan for the fifteen (15) Category V exceptions, but those plans had not been implemented at the time of its January 17, 2003 filing. For twelve (12) of those exceptions, SBC Illinois does not expect the change to have a material negative impact on previously reported results. The remaining three issues did not have a material negative impact on previously reported results, and would be restated with the June through December 2002 results.

On June 4, 2003, SBC Illinois filed a *Notice of Filing the Ernst & Young Final Report*, in which SBC Illinois asserted that as of April 16, 2003, “all 128 instances of material noncompliance noted by E&Y have been corrected or do not require corrective action . . .”<sup>30</sup> This information was not evaluated as part of

<sup>29</sup> Those PMS are 54, 54.1, 65, and 65.1.

<sup>30</sup> *Notice of Filing the Ernst & Young Final Report*, “Report of Management on Changes

Docket No. 01-0662 investigation.

**(b) SBC Illinois' Interpretation of Business Rules and Internal Controls**

E&Y identified that SBC Illinois made 48 interpretations of the business rules during its day-to-day management of its systems. CLECs agreed to 32 of those interpretations. Of the remaining 16 interpretations, 15 did not require any changes to the business rules since the interpretation was consistent with the letter of the current business rules, and the last remaining interpretation resulted in a business rule change that was effective as of the June 2002 performance data results.<sup>31</sup>

E&Y noted two issues related to SBC Illinois' internal controls.<sup>32</sup> SBC Illinois alleged that these issues are no longer problems since it has greatly enhanced and expanded its controls, hired new staff and educated them about the SBC Illinois performance measures, the reporting process and the management control process.

**D. Parties' Positions, Arguments, and Evidence**

AT&T, McLeodUSA/TDS MetroCom, WorldCom and Staff filed their initial affidavits/comments on February 19, 2003, in response to SBC Illinois' affidavits. All responsive parties generally had the same approach to this issue -- SBC Illinois' OSS systems and performance measures do not comply with the 271 criteria based on the results of BearingPoint's Interim PM Report, and that the E&Y Audit either supports the premise that there are problems with SBC Illinois' systems, or should not be relied upon because there were flaws inherent in E&Y's testing, or E&Y lacked independence from SBC Illinois, or E&Y's test was not as comprehensive as BearingPoint's.

**(a) BearingPoint's Interim Performance Metrics Report**

The parties alleged that SBC Illinois' OSS systems and performance measures do not comply with the 271 criteria based on the results of BearingPoint's Interim PM Report. AT&T stated that since the format of BearingPoint's testing is test-until-you pass, the continuation of testing indicates that SBC Illinois' systems have not satisfied the criteria of the audit.<sup>33</sup> AT&T also argued that the 907 restatements that SBC Illinois issued from May 2002 through December 2002, and the sheer volume of restatements<sup>34</sup>, indicates that SBC

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Implemented to the Reporting of Performance Measurements Pursuant to the Illinois business Rules ("Final Corrective Action Report") dated April 16, 2003, filed on June 4, 2003.

<sup>31</sup> *Id.* at ¶¶2606-07.

<sup>32</sup> Docket No. 01-0662, Affidavit of James Ehr on behalf of SBC Illinois, dated Jan 17, 2003, (filed on April 10, 2003). Attachment Q -- *Notice of Filing the Ernst & Young Initial Report of Management Attachment A – Exceptions to Compliance* at 24.

<sup>33</sup> *Order*, at ¶¶ 2621-72.

<sup>34</sup> Restatements only occur when an ILEC is in non-compliance with its business rule and the

Illinois' wholesale systems and processes are unstable and unreliable.<sup>35</sup> McLeodUSA/TDS Metrocom further argued that the number of exceptions and observations that remain open with respect to BearingPoint's PMR1, PMR4 and PMR5 demonstrate serious doubts as to the integrity and accuracy of performance measurement data.<sup>36</sup>

Staff argued that the ICC should not rely upon SBC Illinois performance measurement system until it has proved that it can meet the evaluation criteria used by BearingPoint. Staff contended that the BearingPoint Interim Report<sup>37</sup> adequately demonstrates that point since SBC Illinois has failed to satisfy over 76% of the evaluation criteria set forth in the MTP. In interpreting the BearingPoint results, Staff noted the potential impacts of the failures. In terms of PMR1 Staff stated that "if the company cannot demonstrate that it can satisfy the majority of these evaluation criteria, the findings . . . raise too many questions to trust that SBC Illinois has adequate data collection and storage practices and procedures in place to be able to report its performance metrics data in an accurate and consistent manner."<sup>38</sup> Staff's assessment regarding the BearingPoint evaluation of PMR3 was that the findings "reflect grave deficiencies in key process that a company needs to have in place to implement changes to its key performance measurements without impacting the integrity or accuracy of the data being reported." The BearingPoint evaluation found problems with PMR4 that impact ordering, provisioning, billing, 911, coordinated conversions, and bona fide requests; BearingPoint could not conduct the data integrity review for miscellaneous administrative, directory assistance/operator services, poles conduits and right of way, collocations and directory assistance database. Since BearingPoint's Interim PM Report was issued, BearingPoint has issued four new PMR4 exceptions, and Staff interpreted these results as "missing data or incorrect transformation of data, may result in performance measurements being misstated." Staff emphasized that, "successful completion of this test is very important." Within PMR5, BearingPoint found that SBC Illinois did not satisfy forty-one (41) of the eight-six (86) evaluation criteria. Staff interpreted this data to indicate that BearingPoint cannot "verify that the company calculates its performance measurements correctly and in accordance with our approved business rules."<sup>39</sup>

In response to Staff's and CLECs interpretation of the BearingPoint results, SBC Illinois stated that those parties just rely on the finding of "Not Satisfied" without actually clarifying if that finding is a real problem. Further, SBC Illinois stated that the parties have not accounted for its responses or corrections to the exceptions.

### **(b) Ernst and Young's Performance Metrics Examination**

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ILEC has to issue a correction.

<sup>35</sup> Order, at ¶¶2673-80.

<sup>36</sup> Order, at ¶2725.

<sup>37</sup> BearingPoint, OSS Evaluation Project Report: Performance Metrics Report, vol. 1 at 8 (December 20, 2002); Order, at ¶2742,

<sup>38</sup> See Order at ¶¶2746-65.

<sup>39</sup> Order, at ¶¶2761-65.

The parties found numerous concerns with E&Y's audit. These concerns can be categorized as follows: [1] whether E&Y is independent of SBC Illinois such that it has independently designed and executed its audit; [2] whether the E&Y Audit is relevant since it reflects activity in March through May 2002, while the remainder of the data analyzed in this proceeding is from September through November 2002; [3] whether the E&Y Audit is valid since it did not include "raw data", or track the integrity of data from its origination to its use in the reported results; [4] whether the E&Y Audit is reliable and accurate since its audit methodology differs from BearingPoint's methodology; and [5] whether the E&Y Audit can be relied upon given that it relied upon fifty business rule interpretations that were made by SBC Illinois, without CLEC or ICC approval.

(i) Independence and Objectivity of Ernst and Young

McLeodUSA/TDS MetroCom criticized the E&Y audit because it was not conducted through an open, public process under supervision of the ICC. McLeodUSA/TDS MetroCom also questioned E&Y's independence from SBC Illinois since E&Y is the principal outside financial auditor for SBC Illinois.

(ii) Use of March through May 2002 Data

Parties found fault in E&Y's audit because it audited SBC Illinois' PM data for the months of March–May 2002, which are different than the months audited by BearingPoint. Staff noted that category I provides no assurance that the data in months after May 2002 do not contain data inaccuracies that were restated in March through May.<sup>40</sup> In reviewing the category II exceptions, Staff noted that these failures were not corrected until October or November of 2002, and even in the February workshops/hearings, E&Y could not assure the parties that the exceptions noted in March through May do not exist in the months following its validation. Category III includes exceptions that were corrected but not reported, and Staff noted that SBC Illinois has not hired an independent party to verify that these exceptions have been addressed. The category IV exceptions affect approximately 29% of the performance measures, and despite being identified in May 2002; they still had not been corrected by February of 2003.<sup>41</sup>

In response, SBC Illinois supported the evaluation of the March to May performance data by stating that the performance measures and standards did not change between March and November 2002. SBC Illinois rebutted parties' contentions regarding problems subsequent to May 2002, by stating that in the period between May and September 2002, SBC Illinois migrated 25 performance measures from manual to electronic processing (i.e. Decision Support Performance Measurement Reporting System ("DSS")). SBC Illinois stated, however, that parallel testing was performed on the migrated performance measures to ensure that the DSS implementation reached consistent results.

Staff, in reviewing SBC Illinois' response, stated that SBC Illinois provided no assurance that Staff's concerns about data inaccuracies in months

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<sup>40</sup> See Order, at ¶¶2782-85

<sup>41</sup> See Order at ¶¶2788-2901.

subsequent to May 2002 were resolved. In light of SBC Illinois' response, Staff asserted that these failings remain and will undermine the ability of any party to properly evaluate SBC Illinois' performance measurement data submitted in this proceeding for the affected performance measures.

(iii) Raw Data and Data Integrity

Parties complained that E&Y assumed that the raw data it received from SBC Illinois was accurate instead of tracking the data back to its origin. According to the parties, this shortcoming calls into question the integrity of this data and, in turn, the results of the audit.

In response to the CLECs claim that E&Y did not include "raw data" in its audit, SBC Illinois averred that the E&Y affidavit states "E&Y examined underlying raw data' as part of the basis for its examination report."

(iv) Scope of E&Y Audit

The parties questioned the scope of E&Y's audit and alleged that the scope was too limited in several respects. The parties claim that E&Y only reviewed three of the five performance metrics tests performed by BearingPoint, E&Y evaluated performance data for a period of time different than what SBC Illinois submitted for ICC review, E&Y utilized a flawed definition of "material exception", E&Y examined data "culled from the five SBC Illinois Ameritech states rather than an SBC Illinois specific test", and E&Y did not send its own transactions through SBC Illinois' systems as a pseudo-CLEC similar to what BearingPoint had done. The parties also criticized E&Y for not verifying the accuracy of the SBC Illinois responses to the exceptions E&Y identified and basing opinions on source systems that were subsequently changed. AT&T also found fault with E&Y's review of SBC Illinois' corrective actions, stating numerous ways E&Y could have improved its site visits, also citing problems with E&Y's review of performance measurement programming code, and problems with the manner in which E&Y performed its transaction testing.<sup>42</sup>

In evaluating the E&Y audit, Staff first noted that the number of exceptions found by E&Y supports the finding that SBC Illinois' performance measurement data is unreliable. Staff further criticized the scope of the E&Y audit for being limited, relative to the scope of the BearingPoint test. According to Staff, E&Y did not perform part of PMR1, or any of the evaluations performed under PMR2 and PMR3. Further, the methods employed by E&Y to audit the PMR4 and PMR5 testing parameters are different from what was approved in the Master Test Plan for BearingPoint.

In response to the many criticisms of the E&Y audit, SBC Illinois stated that it did not limit the scope of E&Y's investigation, and that the FCC has relied upon audits performed by E&Y in other states. In addition, SBC Illinois stated that the CLECs and Staff have had ample opportunity to review E&Y's report and methodology, ask questions of E&Y personnel and review E&Y's work papers. In response to the differences in methodology between E&Y's audit and BearingPoint's audit, SBC Illinois argued that BearingPoint's audit goes beyond a

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<sup>42</sup> See Order, generally, at ¶¶2681-2807.

normal audit, whereas E&Y's audit was based on its professional judgment and interpretation of professional attestation standards.

(v) SBC Illinois Changes to Business Rules

E&Y was criticized by the parties for accepting SBC Illinois' interpretations of the business rules that were inconsistent with the actual business rules, and not agreed upon by the CLECs. McLeodUSA/TDS MetroCom took issue with the number and impact of the 128 exceptions identified by E&Y and the 50 business rule interpretations made by SBC Illinois. McLeodUSA/TDS MetroCom noted that the 128 exceptions affected approximately 75% of all performance measures, and that the number of business rule interpretations was a concern. As an example of the impact of the business rule interpretations, SBC Illinois excluded from a performance measure the number of customer migrations to SBC Illinois from a CLEC, which affects the line loss notifications to CLECs.

In reviewing SBC Illinois' interpretation of the business rules, Staff pointed out that the reasonableness of SBC Illinois' interpretations is something the ICC should determine. In looking at the scope of impact, the 50 business rule interpretations affect 63% of the performance measures. Moreover, 32 interpretations required changes to the business rules as a result of E&Y's audit. Those interpretations were not included in the tariff that BearingPoint used for its evaluation, therefore, Staff pointed out that the E&Y Audit was performed in a manner that was inconsistent with the business rules that were evaluated for purposes of this 271 application. Of greater concern to Staff is that SBC Illinois has not proven that its procedures and controls that are in place will ensure that additional data reliability concerns will not be introduced after those changes are implemented in mid-2003.<sup>43</sup>

**(c) Additional Assurances of Reliability**

As part of its case, SBC Illinois asserted that on-going supervision by the ICC, data reconciliation, access to raw data and SBC Illinois' data controls should provide additional assurances of reliability of SBC Illinois' performance measurement results.

In response to SBC Illinois' improvements to internal data controls, Staff stated that the efficacy and adequacy of such improvements are not clear since SBC Illinois can not consistently report its performance measures on a monthly basis, and that such assertions by SBC Illinois should not be accepted until they are verified by an independent third party. Staff desired SBC Illinois to continue restating results if it found inaccuracies. However, it is Staff's opinion that the frequency and timing of restatements, such as restatements occurring six months after identification, point to an inherent problem with SBC Illinois' process controls. While SBC Illinois asserted it had improved its controls since the E&Y findings were communicated, Staff asserted the ICC should not be convinced since E&Y stated that it did not do any control testing other than on the corrective actions implemented by the company. Staff disagreed with SBC Illinois purported

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<sup>43</sup> Order, at ¶2903.

assurances, stating that those three assurances of reliability neither inspire sufficient confidence that the errors and exceptions found by BearingPoint and E&Y can be overlooked, nor support SBC's arguments that the three months of performance measurement data submitted by SBC Illinois in this proceeding are accurate or reliable at this time.

AT&T argued, in detail, that E&Y's Third Corrective Action Report (released February 28, 2003) and BearingPoint's most recent list of objections and exceptions (February 18, 2003) demonstrate that a number of data integrity issues remain unresolved. Further, AT&T compared BearingPoint's testing results to BOCs in other states, citing Georgia, Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, Florida, Tennessee, New Jersey, Pennsylvania and Virginia, and argued that SBC Illinois' performance data in Illinois is in far worse shape than those states when they filed with the FCC.

SBC Illinois maintained that exceptions and observations posted by BearingPoint are not affirmative findings of problems with SBC Illinois' systems. In response to AT&T's comparison of the testing in Illinois to testing in other regions, SBC Illinois reiterated that all of the testing needs to be considered, and when that is done, the results in Illinois compare favorably to the results posted in Georgia.

## **E. ICC Analysis and Conclusion**

The ICC found the totality of the evidence to demonstrate that SBC Illinois' commercial performance data is sufficiently reliable. In coming to that finding the ICC reviewed three main items: (1) the BearingPoint Interim PM Report, dated December 20, 2002; (2) the Ernst & Young Performance Measurement Examination ("E&Y Audit") (based on the March to May 2002 period); and (3) additional sources related to performance data and performance reporting reliability.

In its investigation, the ICC focused on determining "whether reported results accurately reflect commercial activity and are calculated in accordance with the approved business rules."<sup>44</sup>

Based on the totality of the evidence, the ICC found that, despite the BearingPoint testing being incomplete, the performance data presented, and in which the FCC will rely upon, accurately reflected SBC Illinois' commercial activity. The ICC based this finding on review of the BearingPoint findings compiled to date, and SBC Illinois' commitment to continue testing performance measures until they pass, taken in conjunction with the E&Y Audit results and other assurances of reliability. Following are the details of the ICC analysis that led to this conclusion.

### **(a) BearingPoint's Interim Performance Metric Report**

The ICC noted that BearingPoint's review and testing of SBC Illinois'

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<sup>44</sup> Order, at ¶2973.

performance measurements is still ongoing. As such, the present status of BearingPoint's review appears to raise a procedural question: whether the completion of BearingPoint's review is a prerequisite for assessing checklist compliance. In other words, does the ongoing nature of BearingPoint's review constitute a bar to going forward?<sup>45</sup>

In the ICC's view, the FCC answered that question in favor of the approach advocated by SBC Illinois.<sup>46</sup> The FCC has never required that all performance audits be complete at the time of an application. Instead, the FCC has not only considered, but also approved, section 271 applications where an audit was incomplete<sup>47</sup> so long as there were reasonable assurances that the reported results were reliable.

Thus, in its analysis, the ICC focused not on whether SBC Illinois has satisfied the "exit criteria" for BearingPoint's test, but whether the totality of the evidence presented provided the ICC with reasonable assurances that SBC Illinois' reported results were accurate. This entailed looking at the completed-to-date review by BearingPoint, the E&Y audits, and other assurances of reliability. The ICC's analysis led it to the following determination: the E&Y audit, taken together with the additional assurances of reliability in the record provide sufficient assurance of reliability. The ICC further found that, in accord with the FCC's pronouncements, BearingPoint's interim findings do not affect that conclusion.<sup>48</sup>

While the BearingPoint Interim PM Report identified that SBC Illinois issued 907 restatements from May 2002 through December 2002, the FCC has repeatedly rejected arguments relying upon the number of restatements issued.<sup>49</sup> During the February 5, 2003 transcribed workshop meeting in Docket No. 01-0662, BearingPoint representatives explained that "it's very hard for us -- if not impossible for us to use restatement activity as a proxy for making a judgment as to whether there's a problem with controls and edits because we are now at a point in the test where we actually stimulate restatements. When we find that there's a problem with the measure, the company may determine that it's going to restate."<sup>50</sup>

The ICC concluded that it is not the existence of or the sheer number of restatements, but the material effect of those restatements that indicates whether a problem exists. In the end, the ICC found that the parties did not show any examples of any one restatement, or group of restatements, that are material enough to have made a real difference in the overall analysis.

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<sup>45</sup> See Order at ¶¶2920-69.

<sup>46</sup> Georgia/Louisiana Order, ¶¶17, 19

<sup>47</sup> Id.

<sup>48</sup> Order, at ¶¶296567.

<sup>49</sup> See New Jersey Order at ¶90 (stating that "[w]e reject the arguments made by AT&T and other parties that challenge the reliability of Verizon's data on the basis of the sheer volume of the changes and corrections made to its processes for including the relevant data); Georgia/Louisiana Order at ¶17 (rejecting the CLEC claims that "the pattern of restatements of the data by BellSouth and BellSouth's acknowledgments of problems with certain metrics mean that the data is not stable enough to be relied upon").

<sup>50</sup> ICC Docket No. 01-0662, Tr. 2237-38.

Since the ICC released its Order in May 2003, BearingPoint issued an updated report in June 2003, for data up to May 1, 2003. That updated report shows that SBC Illinois has continued to correct problems. As of May 1, 2003, SBC Illinois was failing to meet 42.1%<sup>51</sup> of the performance metrics evaluation criteria.

### **(b) Ernst & Young Performance Measurement Examination**

In its pleadings, the parties presented five challenges to the use of the E&Y Audit: [1] whether E&Y is independent of SBC Illinois such that it has independently designed and executed its audit; [2] whether the E&Y Audit is relevant since it reflects activity in March through May 2002, while the remainder of the data analyzed in this proceeding is from September through November 2002; [3] whether the E&Y Audit is valid since it did not include “raw data”, or track the integrity of data from its origination to its use in the reported results; [4] whether the E&Y Audit is reliable and accurate since its audit methodology differs from BearingPoint’s methodology; and [5] whether the E&Y Audit can be relied upon given that it relied upon fifty business rule interpretations that were made by SBC Illinois, without CLEC or ICC approval.

#### (i) Independence and Objectivity of E&Y

The ICC concluded that the E&Y audit was independently designed and executed, and therefore the CLECs’ contentions that E&Y is not objective or impartial are unsupported and unfounded. The ICC found that E&Y designed its own procedures, and those procedures were based on accepted attestation principles and its extensive experience in the field.

The ICC reasoned that E&Y’s extensive experience supports the idea that the test was independently designed. E&Y is an established independent firm of international scope who has prepared performance measurement reports and possesses experience performing similar work in previous 271 applications<sup>52</sup>.

#### (ii) Use of March-May 2002 Data

The ICC rejected AT&T’s assertion that E&Y’s report should be disregarded on the grounds that E&Y audited results for the months of March-May 2002, as opposed to September-November data. The ICC did not find the FCC to have ever required the auditor to examine the exact same data that is submitted with a section 271 application. Indeed, the ICC found that such a requirement would be impossible to carry out because competition would continue during the months the auditor took to complete its work on the data, thereby necessitating new performance results to be published.

The ICC deemed the E&Y testing of data for the March-May 2002 period

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<sup>51</sup> Which is the sum of 25.2% (“Not Satisfied”) and 16.9% (“Indeterminate”). See Table 2 – BearingPoint May 1, 2003 Performance Metrics Results

<sup>52</sup> e.g, Southwestern Bell Telephone’s Arkansas and Missouri 271 application, and its Kansas and Oklahoma 271 application.

to be sufficient. SBC Illinois stated that its processes for reporting were consistent, aside from E&Y-reviewed changes made to correct exceptions. The only allegation of any change in systems and processes relates to SBC Illinois' ongoing expansion of the Decision Support System ("DSS") for performance reporting. The expansion of DSS, however, does not appear to be material based on the evidence presented by SBC Illinois.<sup>53</sup>

### (iii) Raw Data and Data Integrity

The claim that E&Y's audit did not include "raw data," or track the integrity of data from its origination to its use in the reported results, appears contrary to the E&Y affidavit submitted by SBC Illinois stating that "E&Y examined underlying raw data" as part of the basis for its examination report.<sup>54</sup> E&Y examined the data captured in SBC Illinois' source systems to determine that it was accurately transferred down to its performance reporting systems. While SBC Illinois is correct in its position that the use of a "pseudo-CLEC" to submit raw data is not a requirement of professional standards, the use of a "pseudo-CLEC" is still a component of BearingPoint's data integrity review that was not examined as part of the E&Y review.<sup>55</sup> The results of BearingPoint's operational test show SBC Illinois' OSS to have successfully processed the "pseudo-CLEC" transactions. Given that BearingPoint has uncovered problems in those parts of its data integrity review that E&Y did not examine (verification that the link from CLEC submission down to SBC Illinois' performance measurement systems is intact), it seems reasonable that E&Y's testing of the process from SBC Illinois' raw data repositories through the generation of performance reports provides sufficient assurance for the ICC.<sup>56</sup>

### (iv) Scope of E&Y Audit

For the most part, challenges to the E&Y audit focused on differences in the approach or methodology used by E&Y in comparison to the one employed by BearingPoint. These allegations overlooked the inherent difference in the scope of testing. BearingPoint did not just verify SBC Illinois' results, as an auditor would and as E&Y has done. Instead, BearingPoint built an entire system of performance measurements on its own, as part of a process called "blind replication," under which BearingPoint has: (i) independently re-processed the entire stream of raw commercial data for three months; (ii) generated three months of results on every one of the thousands of performance categories; and then, (iii) compared the end results to those reported by SBC Illinois. The ICC determined that both the E&Y audit and the BearingPoint test, have substantial, but different, value.

As such, the Commission rejected parties' arguments that focused on the

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<sup>53</sup> Order, at ¶¶2940-41.

<sup>54</sup> Docket No. 01-0662, SBC Illinois Ex. 2.2 (3/3/03 Ehr Rebuttal) Attachment A, ¶19 (filed on April 10, 2003).

<sup>55</sup> Id. ¶ 22.

<sup>56</sup> Order, at ¶2941.

question of whether the E&Y audit is identical to the BearingPoint test. The Commission concluded that the E&Y audit is not a substitute, and is not held out to be a substitute, for the successful completion of the BearingPoint testing.

The ICC acknowledged the apparent differences in methodology between the E&Y audit and BearingPoint test, and determined that each audit methodology has its own virtues and drawbacks. The Commission found that E&Y's audit was intended to supplement the record, so that the ICC might assess checklist compliance. E&Y determined the scope of its review based on its own professional judgment and in accord with professional attestation standards. E&Y documented both the procedures it employed and its reasoning supporting such procedures, then answered questions from CLECs and the Staff with respect to its decisions. Based on the totality of the evidence, the ICC found that E&Y's audit was sufficient for analyzing checklist compliance. To be sure, additional value to be gleaned from BearingPoint's approach will certainly inform the ICC's ongoing supervision of SBC Illinois, but is not required to assess checklist compliance.<sup>57</sup>

#### (v) SBC Illinois Changes to the Business Rules

Attachment B to E&Y's Audit report lists fifty "interpretations made by management" in applying the business rules for performance measurement. The CLECs alleged that SBC Illinois unilaterally changed the business rules, and contended that, on this basis, E&Y should have expressed a negative opinion. SBC Illinois explained its basis for each interpretation in its January 17, 2003, filing. The ICC found SBC Illinois to have presented an assessment that essentially remains unrebutted. Overall, the ICC found that there was no legitimate reason to dismiss the E&Y audit or attach any less weight to its reports.

In its handling of this matter too, the ICC noted, E&Y's course appeared reasonable. E&Y did not usurp the role of the ICC (as decision maker) or of the collaborative performance measurement review. Rather, E&Y provided information for both the parties and the ICC to make an assessment.

#### **(c) Additional Assurances of Reliability**

SBC Illinois relies upon, what the FCC has identified as, additional assurances of reliability arising from five separate sources:

- the availability of the raw performance data to CLECs and the applicant's "readiness to engage in data reconciliations" between its own records and those of the CLECs;
- the applicant's internal and external data controls;
- the "open and collaborative nature of metric workshops;
- supervision by the applicable state commission; and,
- extensive third-party auditing.<sup>58</sup>

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<sup>57</sup> Order, at ¶¶2942-45.

<sup>58</sup> Georgia/Louisiana Order, ¶19.

While each individual factor, alone, might not provide sufficient assurance, considered collectively, evidence under these factors operates to support and corroborate the results of the E&Y Audit and the completed portions of the BearingPoint test.<sup>59</sup>

(i) The Data Reconciliation Opportunity

The FCC has recognized that a BOC's readiness "to engage in data reconciliations with any requesting carrier" provides valuable assurance as to the reliability of the BOC's data.<sup>60</sup> Further, when the state commission "has established a process for competitive LECs to bring concerns about data integrity to them," and "no competitive LEC has done so," the FCC finds the absence of CLEC action to constitute probative evidence that the applicant's data are reliable.<sup>61</sup>

Since the implementation of Merger Condition 30 in 2000<sup>62</sup>, SBC Illinois has provided each participating CLEC with monthly reports of wholesale performance that show results for that CLEC, and for CLECs in the aggregate, along with the appropriate retail analogs and benchmarks. Further, SBC Illinois has made the underlying raw data available upon request, and several CLECs have requested and received such data.

(ii) Internal Data Controls

In response to feedback received during the BearingPoint test, SBC Illinois has implemented improvements to its internal controls and to its documentation of performance measurement procedures. These improvements have had concrete results; leading SBC Illinois to have made substantial progress in closing exceptions previously identified by BearingPoint.

(iii) The Open Collaboratives

The ICC saw no dispute with respect to the opportunities presented by the continuously ongoing 6-month collaboratives. This forum provides participants full opportunity to review, update, and revise the performance measures. Those changes or any dispute thereon are further brought to the ICC.<sup>63</sup>

(iv) ICC Supervision

In challenging the factor related to on-going ICC supervision, Staff set out the claim that regulators generally do not have live data to make an independent evaluation as to the integrity, accuracy or completeness of the data that a utility such as SBC Illinois' reports. So too, AT&T argued that validating SBC Illinois' reported performance is not an undertaking that this ICC has the resources for,

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<sup>59</sup> Order, at ¶¶2955-56.

<sup>60</sup> Georgia/Louisiana Order, ¶18.

<sup>61</sup> Id.

<sup>62</sup> See SBC Illinois/Ameritech Merger Order, at §VI.B.30 – Performance Measuring, Benchmarks and Liquidation Damages.

<sup>63</sup> Order, at ¶2957-62.

or is in a position to undertake. Such arguments, taken at face value, would wipe out the FCC's factor altogether. The ICC, however, interpreted this factor as inquiring as to whether the state commission exercises oversight over the testing, over any changes agreed upon by the collaborative's participants, and oversight over other relevant matters in dispute between CLECs and the Company. Without question, the ICC is active and available and will continue in the same way for the future.

(v) Extensive Third-Party Auditing

The auditing factor that the FCC deems to be significant is firmly in place in Illinois. E&Y has completed its audit, and the Company has responded to the exceptions E&Y has identified. The testing BearingPoint is performing is continuing, and will continue until SBC Illinois passes all of the evaluation criteria. Further, SBC Illinois is still responding to the BearingPoint exceptions. The ICC is keenly involved in the details of the BearingPoint testing process.

(vi) Commitments

The ICC's Order in Docket No. 01-0662 accepted, with some modification, Staff's alternative proposal that SBC Illinois (a) address all deficiencies raised by BearingPoint in the metrics review; and, (b) commit to successfully concluding the BearingPoint metrics review no later than November 2003, as a precautionary measure. The ICC, however, did not agree with Staff's recommendation that SBC Illinois be required to "commit" to the successful conclusion of BearingPoint's testing by November 2003. It reasoned that the testing process is not solely under the control of SBC Illinois such that it reasonably can be held to guarantee a particular completion date. Rather, the ICC required SBC Illinois to use its own "best and good faith efforts" to facilitate the completion of testing by November 2003. The ICC also directed BearingPoint to submit a report to the ICC by November 28, 2003, describing any open issues and any testing that remains to be completed. After hearing from SBC Illinois and any interested parties, the ICC will then determine how best to proceed. The continued testing is to emphasize that this ICC is focused on maintaining and assuring that SBC Illinois' performance data is reliable and accurate, for purposes of SBC Illinois' section 271 application, and for purposes of ensuring that SBC Illinois' future wholesale performance will not backslide, i.e., the Performance Assurance Plan.<sup>64</sup>

Staff also proposed that auditing of SBC Illinois' performance data continue, which the ICC accepted. (This point is addressed in the review of the Performance Assurance Plan below. See Section IV Performance Assurance Plan.)

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<sup>64</sup> Order, at ¶¶2979-81.

### **III. Satisfaction of the Entry Requirements of Section 271(c)(1)(A)**

#### **A. Standards for Review**

According to Section 271 (c), there are two separate and independent means by which a BOC may satisfy, or qualify under, the Act's initial entry requirements – often referred to as “Track A” and Track “B”, see 47 U.S.C. Section 271(c)(1). SBC's application proceeded under Track A, and the standards for reviewing Track A compliance are as follows.

To qualify for “Track A,” a BOC must have interconnection agreements with one or more competing providers of “telephone exchange service . . . to residential and business subscribers.” 47 U.S.C. Section 271(c)(1). The Act states that “such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier.” *Id.* In the Ameritech Michigan Order, the FCC concluded that, section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers. See also Kansas/Oklahoma 271 Order at para. 40.

When a BOC relies upon more than one competing provider to satisfy section 271(c)(1)(A), each such carrier need not provide service to both residential and business customers. Michigan 271 Order, ¶ 82. The FCC has further held that a BOC must show that at least one of these competing providers constitutes “an actual commercial alternative to the BOC,” which means that the provider serves “more than a *de minimis* number” of subscribers. New Jersey 271 Order, ¶ 10. Once that is done, however, Track A does not “require any particular level of market penetration.” *Id.* At least one court has affirmed that the Act “imposes no volume requirements for satisfaction of Track A.” Sprint Communications Co. v. FCC, 274 F.3d 549, 553-54 (D.C. Cir. 2001).

#### **B. SBC Illinois' Demonstration of Compliance**

SBC showed it had over 150 Commission-approved wireline interconnection and resale agreements with competing providers. At least 12 of these entrants, SBC contended, provide services to residential and business subscribers in Illinois, either exclusively or predominantly over their own facilities, and thus qualify as Track “A” competitors.

According to SBC, CLECs are clearly giving Illinois consumers “an actual commercial alternative.” New Jersey 271 Order, ¶ 10. As of February 2002, it notes, CLECs had gained over 1.8 million lines – approximately 23 percent of the total lines – in the SBC service area. Competitors, SBC contended, served

approximately 1.6 million of these lines over their own facilities.<sup>65</sup> CLECs captured approximately 1.2 million business lines, and over 600,000 residential lines, in SBC's service area. Since then, SBC asserted that CLEC activity continued to grow, exceeding 1.9 million lines by April 2002. These levels of CLEC penetration, SBC contended, outpace *every single one* of the fourteen applications that the FCC has approved thus far.

Further, SBC submitted, an April 2002 study by the Eastern Management Group assessed the current state of competition in ten states, including five states that previously received approval under section 271. The study found that Illinois had the highest level of CLEC penetration save for New York (at 25%), and that CLECs already had higher market share in Illinois than in four states for which the BOCs had obtained long-distance authority under section 271.

The current market figures, SBC contended, reflect substantial growth in recent months. Between September 2000 and September 2001, CLECs' facilities-based lines nearly doubled and UNE loops increased by 43 percent. In the five months between September 2001 and February 2002, SBC maintains, facilities-based lines increased by an additional 347,000 or 27 percent, while unbundled loops increased by another 50,000 or 18 percent.

According to SBC, there is a solid foundation in place for continued growth. The CLECs' *existing* collocation arrangements, it contends, allow them to serve 94 percent of the business customers and 91 percent of the residential customers in SBC's service area. The CLECs' installed switching capacity, SBC asserted, is capable of serving 96 percent of the customers in SBC's serving area.

Vigorous competition is evident, SBC claimed, not only by a review of the data but also through common and everyday experience. CLEC advertisements appear on the television and in the newspapers. In driving down the state's highways one sees a CLEC billboard, and at the home, CLEC customer solicitations arrive in the mail or by telephone. Several CLECs are aggressively packaging and promoting local service plans.

According to SBC, no evidence disputed that it satisfied Track "A." Indeed, Staff agreed "that Ameritech IL meets the requirements in Sec. 271(c)(1)(A) in that there are alternative carriers, which provide telecommunications services predominantly or exclusively over their own telephone exchange facilities in Illinois." Further, not one of the Track A CLECs identified by SBC disputed that it is a Track A carrier.

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<sup>65</sup> These 1.6 million lines include nearly 700,000 lines served by unbundled loops and UNE platforms provided SBC. The FCC has determined that CLECs using UNEs to provide service are providing service over their "own facilities" for purposes of Track "A." Michigan 271 Order, ¶ 94.

### **C. Parties' Positions, Arguments, and Evidence**

Parties attempted to contest the data presented by SBC concerning the number of lines served by CLECs, and also suggested that the data should be ignored because of financial difficulties experienced by some CLECs. SBC contended that its evidence refutes such criticisms. Most important, SBC asserted, is not that the intervenors' arguments are inaccurate, but that these claims are irrelevant for purposes of determining whether SBC satisfies Track A.

No party contended that competitive entry in Illinois falls short of the Track "A" standards established by federal law, SBC noted. Moreover, while some parties questioned the methodology that the Company used to estimate CLEC lines, no CLEC provided its own records to rebut the number of lines that SBC estimated for that CLEC.

### **D. ICC Analysis and Conclusion – Track A**

No party disputed that SBC had at least 150 Commission-approved wireline and resale agreements with competing providers. At least twelve of those entrants provided services to residential and business subscribers in the State of Illinois, either exclusively or predominantly over their own facilities.

ICC Staff agreed that SBC satisfies the Track A requirements. WorldCom contended that the question as to whether facilities-based local providers exist is not even an issue. In its Exceptions Brief, AT&T also agreed that SBC has satisfied the requirements of Track A.

Despite the numerous arguments raised regarding the degree of competition in SBC's service territory, the ICC remained focused on the only relevant issue: whether SBC provided sufficient evidence that one or more carriers are providing local exchange services either exclusively over their own telephone exchange service facilities or in combination with the resale of the telecommunications services of another carrier. On this key issue, SBC provided voluminous evidence to warrant a finding that the eligibility requirements of Section 271(c)(1)(A) are satisfied.

## **IV. THE "COMPETITIVE CHECKLIST" ITEMS SECTION 271(c)(2)(B)**

To gain approval of its Application, and a favorable recommendation from the ICC, SBC must demonstrate that it satisfies the requirements of Section 271 (c)(2)(B), which consists of 14 Checklist Items. In addressing each item of the 14-point checklist, the ICC's Final Order in Docket No. 01-0662 reflected a studied review of: (i) the applicable commercial performance results for the September-November 2002 period; (ii) pertinent aspects of the OSS test; and, (iii) the many and varied issues raised by Staff, the CLECs and the Governmental

Intervenors, in both Phase I and Phase II of that proceeding, as relative to the respective checklist items.

The analysis of commercial results that was presented largely followed the two-part test employed by the FCC in prior orders under section 271. For measures involving analogous wholesale and retail services, “parity” was assessed by comparing SBC Illinois’ performance, in providing a particular service to CLECs, against its performance with respect to its own retail operations (or its affiliate, as applicable) using accepted statistical techniques. Where no reasonable retail or affiliate analog existed (e.g., SBC Illinois does not provide unbundled access to network elements to itself), the Company’s performance in providing such services to CLECs was compared to a predetermined “benchmark” level of service established by agreement in the collaborative processes described above.

In the FCC’s words, “the use of statistical analysis to take into account random variation in the [performance] metrics is desirable” and “[s]tatistical tests can be used as a tool in determining whether a difference in the measured values of two metrics means that the metrics probably measure two different processes, or instead that the two measurements are likely to have been produced by the same process.” New York 271 Order, App. B, ¶¶ 2-3. The first step is to look at each individual performance test, measure the difference between wholesale performance and the applicable standard through the use of a measure called a “z-statistic.” That difference is then compared to a “critical value.” The critical value is the value of “z” that would be large enough to yield 95 percent confidence that there is truly some underlying disparity in the reported results. This approach to assessing individual performance tests was the same as that used in the then-current remedy plan ordered by the ICC in Docket No. 01-0120.

While statistical analysis and performance benchmarks provide useful tools to analyze performance data, they are not infallible or absolute, and the FCC has emphasized that a shortfall in any particular measurement does not, in and of itself, dictate a finding of non-compliance. Kansas & Oklahoma 271 Order, ¶ 31. Thus, the FCC has said that its determination of compliance with the requirements of section 271 “necessarily is a contextual decision based on the totality of the circumstances and information before us.” Id. ¶ 31. Consequently, where statistically significant differences exist in a given measurement, the FCC will “examine the evidence further to make a determination whether the statutory nondiscrimination requirements are met.” Id. The examination includes explanations provided (by both the applicant and other commenters) about whether measured performance differences present an accurate depiction of the quality of the applicant’s performance. Id. The FCC also may (i) examine performance data on a more disaggregated level, (ii) take note of how long a variation in performance has existed and what the trend has been in recent months, (iii) look for steady improvements in performance over time and, where appropriate, (iv) conclude that while statistically significant differences in

measured performance exist, such differences “suggest only an insignificant competitive impact.” Id. ¶ 32.

The record adduced in the ICC’s investigative proceeding reflected different approaches to the commercial performance results. As a general rule, SBC Illinois considered a measure “passed” if the applicable standard is met in two out of the three months in the September-November “study period.” SBC Illinois noted that in total, it met or surpassed parity or benchmark standards for 87.7%, or 398 of 454 performance measurements with at least 10 data points, in at least two of the three months. For measures subject to performance remedies, SBC Illinois stated that it met the applicable standard for 93.4% (328 of 351) of Tier 1 and/or Tier 2 measures in at least two of the three months. Where the parity or benchmark tests identified differences, SBC Illinois provided further discussion of the totality of the facts, considering whether the shortfalls were isolated, small, or not significant when viewed in the context of related measurements, or were addressed by corrective action.

The CLECs discussed but a few performance measures briefly, but provided no comprehensive analysis based on their argument not that the performance results show non-compliance, but that the results should be ignored as unreliable. That position was considered by the ICC and is reflected in Part III of this Report, *supra*.

Staff took a different approach. First, Staff looked at the results of a particular measure: where SBC Illinois “passed” the measure in at least two out of three months, as a general rule Staff concludes that the measure supported checklist compliance. By contrast, where there was a performance shortfall in at least two months, Staff requested additional explanation and information from SBC Illinois. If there was performance data for more than one category within a given measure, Staff generally concluded that SBC Illinois “passed” the measure as a whole if it passed 90 percent or more of the categories within that measure in at least two out of three months, and sought additional information or explanation if SBC Illinois did not pass 90 percent of the categories.

All in all, the approaches taken by both SBC Illinois and Staff shared some important common elements. At the outset, both used statistical analysis, based on a 95 percent confidence test, to assess parity. Further, both used a general guideline indicating that a measure is “passed” if SBC Illinois meets or beats the applicable standard in at least two out of three months. And, in the end, for several checklist items or parts of checklist items Staff shared SBC Illinois’ position that the checklist item was satisfied. There were, however, some guidelines on which Staff and SBC Illinois did not agree. In particular, SBC Illinois had alleged that, Staff’s “90 percent of the categories” approach leads it to declare several measures “failed” if even a single small-volume category shows a shortfall. Nevertheless, both Staff and SBC Illinois agreed on the most important point: that the ultimate conclusion of compliance is based on judgment and no numerical test is, in and of itself, dispositive. In this same spirit, the ICC

considered the qualitative and quantitative approaches of both SBC Illinois and Staff and reached decision on the basis of reasonable and informed judgment.

Here follows the ICC's assessment and recommendations on each of the 14 Checklist Items set out under Section 271 (c)(2)(B) of the Act and as based on the whole of its compliance investigation proceeding, i.e., ICC Docket No. 01-0662.

## **CHECKLIST ITEM 1 – INTERCONNECTION.**

### **A. Standards for Review**

Section 271(c)(2)(B)(i) of the Act requires a Section 271 applicant to provide: “[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).” 47 U.S.C. Section 271 (c)(2)(B)(i).<sup>66</sup> In the Local Competition First Report and Order, the FCC concluded that interconnection referred “only to the physical linking of two networks for the mutual exchange of traffic.” Id. para.176. As such, the transport and termination of traffic is excluded from the FCC’s definition of interconnection. Id.

Section 251(c)(2) of the 1996 Act imposes, on incumbent LECs, the duty “to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network . . . for the transmission and routing of telephone exchange service and exchange access.” 47 U.S.C. Sec. 251(c)(2)(A). It further sets out three requirements for the provision of interconnection.

First, an incumbent LEC must provide interconnection “at any technically feasible point within the carrier’s network.” 47 U.S.C. Sec. 251(c)(2)(B) (emphasis added). Second, an incumbent LEC must provide interconnection that is “at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party. 47 U.S.C. Sec. 251(c)(2)(C) (emphasis added). Third, the incumbent LEC must provide interconnection “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252.” 47 U.S.C. Sec. 251 (c)(2)(D) (emphasis added).

Competing carriers may choose any method of “technically feasible” interconnection at a particular point on the incumbent LEC’s network. Technically feasible methods include, but are not limited to, incumbent LEC provision of interconnection trunking, physical and virtual collocation and meet point arrangements. The provision of collocation is an essential to demonstrating compliance with item 1 of the competitive checklist. In the Advanced Services First Report and Order, the FCC revised its collocation rules to require incumbent

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<sup>66</sup> A full discussion of the Checklist Item 1 requirements is contained at paragraphs 141-156 of our Final Order in Docket 01-0662.

LECs to include shared cage and cageless collocation arrangements as part of their physical collocation offerings.

In response to a remand from the D.C. Circuit, the FCC adopted the Collocation Remand Order, establishing revised criteria for equipment for which incumbent LECs must permit collocation, requiring incumbent LECs to provide cross-connects between collocated carriers, and establishing principles for physical collocation space and configuration. Data showing the quality of procedures for processing applications for collocation space, as well as the timeliness and efficiency of provisioning collocation space, help the Commission evaluate a BOC's compliance with its collocation obligations.

To implement the "equal-in-quality" requirement in section 251, the FCC's rules require an incumbent LEC to design and operate its interconnection facilities to meet "the same technical criteria and service standards" that are used for the interoffice trunks within the incumbent LEC's network. In the Local Competition First Report and Order, the FCC identified trunk group blockage and transmission standards as indicators of an incumbent LEC's technical criteria and service standards. In prior section 271 applications, the FCC concluded that disparities in trunk group blockage indicated a failure to provide interconnection to competing carriers equal-in-quality to the interconnection the BOC provided to its own retail operations.

In the Local Competition First Report and Order, the FCC concluded that the requirement to provide interconnection on terms and conditions that are "just, reasonable, and nondiscriminatory" means that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations. The FCC's rules interpret this obligation to include, among other things, the incumbent LEC's "installation time" for interconnection service, and its provisioning of two-way trunking arrangements. Similarly, repair time for troubles affecting interconnection trunks is useful for determining whether a BOC provides interconnection service under "terms and conditions that are no less favorable than the terms and conditions" the BOC provides to its own retail operations.

Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit. 47 U.S.C. Sec. 252 (d) (1) The FCC's pricing rules require, among other things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation based on TELRIC.

To the extent that pricing disputes arise, the FCC will not duplicate the work of the state commissions. As noted in the SWBT Texas Order, the Act authorizes the state commissions to resolve specific carrier-to-carrier disputes arising under the local competition provisions, and it authorizes the federal district courts to ensure that the results of the state arbitration process are consistent with federal law. Although the FCC has an independent statutory

obligation to ensure compliance with the checklist, section 271 does not compel it to preempt the orderly disposition of intercarrier disputes by the state commissions, particularly now that the Supreme Court has restored the FCC's pricing jurisdiction and has thereby directed the state commissions to follow FCC pricing rules in their disposition of those disputes.

Consistent with the FCC's precedent, the mere presence of interim rates will not generally threaten a section 271 application so long as the following conditions are satisfied: (1) an interim solution to a particular rate dispute is reasonable under the circumstances, (2) the state commission has demonstrated its commitment to the Commission's pricing rules, and (3) provision is made for refunds or true-ups once permanent rates are set. Bell Atlantic New York Order, 15 FCC Rcd at 4091, para. 258.

## **B. The State Perspective**

In 1995, the ICC found that "[t]echnically and economically efficient interconnection of incumbent LEC and new LEC networks is an essential predicate to the emergence of a competitive local exchange market." Order at 78, Docket 94-0096, Illinois Bell Telephone Company, Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois. (April 7, 1995).

The ICC addressed the basic rules of interconnection in its Administrative Code Part 790 adopted in Docket 92-0398. Order, Docket 92-0398, Illinois Commerce Commission On Its Own Motion, Development of a Statewide Policy Regarding Local Interconnection Standards. (April 6, 1994) Those rules were reviewed and updated in Docket 99-0511. Order, Docket 99-0511, Illinois Commerce Commission On Its Own Motion, Revision of 83 Illinois Administrative Code 790. (March 27, 2002).

The ICC addressed SBC Illinois' obligations regarding collocation in Docket 99-0615. Order, Docket 99-0615, Illinois Bell Telephone Company Proposed Expansion of Collocation Tariffs. (August 15, 2000).

In July of 2001, the Illinois General Assembly enacted Section 13-801 of the Public Utilities Act, which adopted interconnection requirements additional to those set out in the federal Telecommunications Act of 1996. The ICC addressed the requirements of Section 13-801 in Docket 01-0614. Order, Docket 01-0614, Illinois Bell Telephone Company Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act. (June 11, 2002).

## **C. SBC Illinois' Demonstration of Compliance**

SBC Illinois contended that it makes all required forms of interconnection available pursuant to binding interconnection agreements. (Am. Ill. Ex. 5.0 Sch. WCD-1, ¶¶ 14-15). A CLEC can interconnect its network with SBC's network at any of the many points required by the applicable FCC rule, i.e., 47 C.F.R. § 51.305(a)(2), as well as at other technically feasible point upon request. (Id. ¶¶

14, 23-24, 31). Further, CLECs, at their discretion, can obtain a single point of interconnection (“SPOI”) per LATA, or may choose to interconnect at multiple points per LATA. (Id. ¶ 32).

SBC Illinois claimed that it uses standard trunk traffic engineering methods to ensure that interconnection trunking is managed in the same manner as the trunks used to carry its own local services. (Id. ¶ 49). In order to ensure nondiscrimination, SBC Illinois stated that it interconnects with CLECs using the same facilities, interfaces, technical criteria, and service standards that it uses for its own retail operations. ( Id. ¶¶ 33-34).

#### **D. Parties’ Positions, Arguments and Evidence**

In their respective filings and on record for the ICC’s investigation proceeding in Docket No. 01-0662, our Staff and/or the parties set out the following issues:

##### **1. Access to the MDF/CFA**

A number of CLECs claimed that SBC Illinois is not in compliance with Checklist Item 1 because of its current policy of not allowing CLECs direct access to the Main Distribution Frame (“MDF”) and Connecting Facility Assignments (“CFAs”).<sup>67</sup> The MDF is the facility within SBC’s CO on which every customer line, trunk and circuit is terminated as it enters the CO. CFA is a term referring to the basic interconnection points where SBC connects its wires to a CLEC’s network. Specifically, a CFA describes the arrangement whereby a terminal block on SBC’s MDF in the local CO is assigned as a point of connection for CLECs’ collocation cable. In order for a CLEC to order a UNE loop, the CLEC must have a terminal block on the MDF with copper wires connected back to its collocation space.

Although CLECs have direct access to their physical collocation space 24 hours a day, seven days a week, SBC’s policy requires CLECs to use approved third party vendors to perform work in SBC’s space in the central office (“CO”).

According to the CLECs, their technicians should be permitted to access the MDF/CFAs directly, in that such access is required to perform necessary maintenance functions, to test CLECs’ lines running between the MDF/CFAs and their collocation space, to verify dial tone, and to perform other functions. CLECs asserted that without the ability to test at the CFA, a CLEC must rely on SBC’s judgment, not only to perform the testing, but also to determine in whose network the trouble resides. The CLECs view SBC’s policy requiring use of third party vendors as cumbersome, as creating unnecessary expense, and as causing extended service outages for their customers.

CLECs also asserted that SBC’s policy does not provide them access to CFAs at parity with SBC’s access. CLECs complained that they must take the additional time to hire an approved contractor and to schedule an acceptable

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<sup>67</sup> The positions and arguments of the parties with respect to access to the MDF/CFAs, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 180-184, 217-222, 240-248, 263-266, 289-292, 305-308, and 314-316.

time to conduct tests, whereas SBC has full access to COs and can conduct tests as the need arises using its own technicians. CLECs further contended that Section 251(c)(6) requires SBC to provide CLECs with nondiscriminatory access to collocation, including access to the CFAs.

CLECs also pointed out that SBC had previously allowed CLECs to directly access the MDF/CFA. CLECs also asserted that there is simply no basis for concluding that there is a greater security risk when a CLEC accesses the CFA escorted by SBC personnel than when a third party vendor accesses the CFA without an escort. CLECs also noted that SBC has not cited to even one instance where a CLEC technician has caused security problems when accessing the CFA. CLECs asserted that although it would be reasonable for SBC to claim that it needs to maintain a certification or credentialing procedure for third parties to access the CFA, SBC has given no reason why CLEC employees, just like third-party vendor employees, cannot be certified and credentialed through such a process.

In response to CLEC complaints, SBC maintained that it has no obligation to provide collocating CLECs access to the MDF. In the *Texas 271 Order*, it asserted, the FCC found that SWBT's collocation tariff satisfied the checklist, even though that tariff expressly prohibited CLEC access to the MDF.<sup>68</sup> SBC maintained that since access to the MDF is not required, its third party vendor policy is a necessary, practical and reasonable way to give CLECs the ability to perform work such as testing and maintenance functions outside their collocation space. According to SBC, third-party vendors must be certified by the company to ensure that all technicians who work on its network facilities are properly trained and insured, and will not harm the facilities of SBC or other CLECs whose facilities terminate on the MDF. SBC noted that this approach also limits the absolute number of people working in confined CO space, which further reduces the potential for trouble reports and service outages for all customers.

SBC asserted that its third-party vendor policy is neither overly cumbersome, nor does it result in excessively long service outages. SBC stated that its technicians will assist CLECs in troubleshooting service outages without the need for vendor involvement. As such, CLECs would require third-party vendor support only when the problem resides in their facilities. According to SBC, where such use of a third-party vendor is actually required in a service outage or maintenance situation, the CLEC vendor can obtain ready access to SBC's CO and resolve the problem expeditiously.

SBC asserted that CLECs provide no legal basis for their position other than some generic references to SBC's obligation to provide collocation on a nondiscriminatory basis. SBC further noted that the ICC has already concluded that direct access to the MDF is not required. SBC observed that some CLECs want to return to the "good old days" prior to September 11, 2001, when some SBC Illinois employees apparently failed to enforce Company security policies and sometimes allowed CLEC technicians escorted access to the MDF. SBC explained that the certification program for third party vendors ensures that they

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<sup>68</sup> Am. Ill. Ex. 1.1 at 17.

are knowledgeable and can be trusted to work unescorted at the MDF. SBC further stated that its policy also keeps the total number of technicians working in a central office to a manageable level.

### **ICC Analysis and Conclusion – Access to MDF/CFA**

The ICC examined this issue on two levels: (1) is the request founded on a matter of law or convenience; and (2) is there a reason for the Company's refusal of access or is it arbitrary and capricious. Apparently, in times prior to September 11, 2001, SBC's employees were lax in enforcing the Company's security policy and would occasionally allow CLEC's access to the MDF with an escort. This did not, in the ICC's view, constitute a waiver that precludes SBC from now reasserting its policy. Most important to the ICC's analysis and resolution of this issue, however, was that the FCC has not required BOCs to provide access to the MDF. Indeed, SBC pointed out that, in the Texas 271 Order, the FCC found SWBT's collocation tariff to satisfy the checklist even though said tariff expressly prohibited CLEC access to the MDF. As such, the ICC determined that there was no compliance issue at stake.

## **2. Transiting**

Staff questioned SBC's policy of not accepting local traffic from an interconnected CLEC when the CLEC is delivering local traffic that originated on a third party's network. Staff explained that this service, known as "transiting", allows Carrier A to send telecommunications traffic to Carrier B's network through Carrier C's tandem or functionally similar facilities.<sup>69</sup> In this situation, SBC does not originate or terminate the call, but merely provides transiting service. Staff asserted that SBC had not demonstrated that it allows carriers to interconnect for the purpose of providing transiting between a third party carrier and SBC.

According to Staff, neither federal nor state rules permit SBC to refuse traffic from, or refuse to send traffic to, an interconnected carrier if that traffic does not terminate or originate with that carrier. Staff noted that Section 251(a)(1) of the 1996 Act requires SBC to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). Staff further contended that nothing in the Act or FCC rules relieves SBC of its obligation to interconnect with telecommunications carriers that provide interoffice transport, including transiting of third party local exchange and exchange access service.

Although SBC testified that "[SBC] Illinois can and does" accept third party local traffic from interconnecting carriers, Staff pointed out that this appeared to conflict with SBC's surrebuttal testimony that "[t]his appears to be more of a

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<sup>69</sup> The positions and arguments of the parties with respect to transiting, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 170-171, 195-198, 260-262, 275-277, and 317-318.

theoretical issue and not the type of interconnection issue that should be part of a 271 checklist compliance docket.” In Staff’s opinion, the only credible evidence regarding SBC’s policy on accepting third party local traffic from interconnecting carriers is that Verizon Wireless attempted to include terms in an interconnection agreement permitting it to send SBC traffic carried for third party providers and the Company effectively blocked it from including such terms. In Staff’s view, this demonstrated that SBC does not provide interconnection in compliance with the requirements of Section 271. Staff maintained that it demonstrated that SBC has blocked at least one CLEC from incorporating “terms” for transiting in its interconnection agreement.

SBC asserted that there is no requirement under Section 271 that it provide transiting service, but that it does accept such traffic and, in reality, is unable to distinguish transited traffic from direct traffic. In SBC’s view, Staff’s real concern is directed toward form (not having an interconnection agreement with any CLEC that “explicitly” requires it to accept such traffic) and not substance.

Moreover, SBC argued, we had already declined to require it to include such language in an interconnection agreement in the Verizon Wireless arbitration. SBC further contended that Staff had not shown that any CLEC has plans to transit traffic in Illinois (similar to our observation in the Verizon Wireless arbitration that Verizon had not actually asked for authorization to transit and had no concrete plans to transit in Illinois).

SBC argued that given the uncontested evidence that SBC Illinois does accept such traffic and could not prevent carriers from delivering such traffic even if its “policy” were otherwise, the ICC should not address the theoretical question of whether or not section 251(c)(2) requires SBC Illinois to accept such traffic. SBC contended that the ICC should adhere to its decision in the Verizon Wireless arbitration and decline to find that SBC Illinois is legally obligated to accept such traffic.

### **ICC Analysis and Conclusion – Transiting**

The ICC found Staff’s attempt to rely on the general interconnection language of Section 251 (a)(1) to be unavailing because the FCC has stated that the transport and termination of traffic is excluded from the definition of interconnection. See. New Jersey 271 Order, Appendix C. Further, the ICC noted that, the entire evidentiary basis to support Staff’s claim is simply that Verizon was unable to include transiting in its agreement with SBC. Yet, as SBC informed, the ICC declined to put the Company to this requirement in Docket 01-0007 where the requesting carrier did not ask the authorization to transit and had no concrete plans to transit. ICC Order, Docket No. 01-0007 (May 1, 2002). As such, the ICC found Staff’s basis to be no basis at all, and rejected Staff’s concerns regarding transiting as it relates to Checklist Item 1 compliance.

### **3. Single Point of Interconnection**

A number of parties, including ICC Staff, raised issues concerning SBC’s

compliance with its obligation under Section 251 of the Act to offer carriers a single point of interconnection ("SPOI") in each LATA that it serves.<sup>70</sup> ICC Staff noted that in the Texas II 271 Order, the FCC stated that "a competitive LEC has the option to interconnect at only one technically feasible point in each LATA." *Id.* at para. 78. Similarly, Staff noted Section 13-801(b)(1) of the PUA similarly provides that an ILEC "may not require the requesting carrier to interconnect at more than one technically feasible point within a LATA". 220 ILCS 5/13-801(b)(1).

Staff further observed that on June 11, 2002, the ICC ordered SBC to provide CLECs with the option of electing as few as one POI per LATA for the purposes of exchanging local traffic and permitting CLECs to elect a compensation scheme where each carrier is responsible for transport costs on its own side of the POI. ICC Order at 105-106, Docket No. 01-0614. ICC Staff and SBC entered into a Stipulation to Eliminate Issues ("Stipulation") filed with the ICC on August 23, 2002. The Stipulation provided that certain issues raised by ICC Staff and SBC have been addressed adequately in Docket No. 01-0614 and in the 01-0614 Compliance Tariff and need not be addressed again in our Section 271 investigation docket). Both ICC Staff and SBC agreed that the terms and conditions under which SBC Illinois offers a single point of interconnection or "SPOI" is one of the 01-0614 Stipulation Issues.

AT&T asserted that one difficulty with SBC's POI policy is that in order for a CLEC to serve a LATA, the CLEC must first interconnect with SBC and establish a POI in the SBC serving area of the LATA. AT&T asserted that when a CLEC offers service in a LATA, it may get customers that sign up for its services in any geographic portion of the LATA. According to AT&T, the geographic location of the CLEC customers in the LATA should not force the CLEC to interconnect with multiple service providers and to establish multiple POIs in the LATA.

AT&T argued that the Act and FCC orders provide that new entrants may interconnect at any technically feasible point. Specifically, Rule 51.305(a)(2) obligates SBC to allow interconnection by a CLEC at any technically feasible point. AT&T observed, Section 251(c)(2) gives the CLEC the right to select where it wants to interconnect, thereby enabling it to establish, if it wishes, as little as one POI per LATA. According to AT&T, this rule allows a single switch presence per LATA and enables new entrants to grow their business economically without having to duplicate the ILEC's existing network.

AT&T also argued that a requirement that it bear financial responsibility for establishing transport to each SBC end office switch is indistinguishable from requiring AT&T to establish multiple POIs at each SBC switch. As such, AT&T asserted, SBC has effectively deprived AT&T of its statutory right to select the

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<sup>70</sup> The positions and arguments of the parties with respect to the single point of interconnection issue, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 169, 199-202, 223-230, 253-254, 259, 278-280, 284, 302-304 and 325-326.

POI. See *Virginia Arbitration Order 53* (finding that only contract language in which “each party would bear the cost of delivering its originating traffic to the point of interconnection designated by the competitive LEC” is consistent with the statutory right to interconnect at any technically feasible point).

In response, SBC contended that there is no SPOI issue in this case. SBC provided testimony that it offers a physical SPOI, and contended that the only dispute is whether it must provide free transport to and from that SPOI. SBC observed that the ICC’s Order in Docket No. 01-0614 required it to provide free transport to the SPOI and, while reserving all rights to challenge that decision, the Company has filed a compliance tariff to implement that decision.

SBC further argued that AT&T’s objection to establishing a point of interconnection “in the [SBC] Illinois serving area of the LATA” lacks merit. SBC noted that Section 251(c)(2)(B) states that an ILEC is to provide interconnection “at any technically feasible point **within the carrier’s network.**” 47 U.S.C. Section 251 (c)(2)(B). (Emphasis added.) Similarly, SBC pointed out, the relevant FCC rule, 47 C.F.R. § 51.305(a)(2), requires that the point of interconnection be established at “any technically feasible point **within the incumbent LEC’s network.**” (Emphasis added). SBC maintained that a point of interconnection located outside the ILEC’s service territory is not “within” the ILEC’s network, and thus, there is no basis for requiring SBC to establish a point of interconnection outside of its service territory.

### **ICC Analysis and Conclusion – Single Point of Interconnection**

The ICC’s Order in Docket No. 01-0614 directed SBC to provide CLECs with the option of electing as little as one POI per LATA (for the purpose of exchanging local traffic) and permitted CLECs to elect a compensation scheme where each carrier is responsible for transport costs on its own side of the POI. SBC has dutifully tariffed this option and currently has tariffed POI rates, terms and conditions consistent with ICC directives. Under these circumstances, the ICC failed to see how AT&T’s arguments with respect to the POI are not addressed by the Compliance tariff under the ICC’s Order in Docket No. 01-0614. The ICC noted that its intent was to assess compliance with the competitive checklist and not to re-litigate settled matters. Accordingly, the ICC did not find SBC to be in violation of its obligation to offer carriers a SPOI.

### **4. General Opt-In Restrictions**

CLECs argued that SBC was not in compliance with its obligation to allow CLECs to “opt in” to particular provisions of other carriers’ interconnection agreements under Section 252(i) of the Act.<sup>71</sup> The parties explained that Section 252(i) of the Act allows CLECs to “opt in” to particular provisions of other carriers’ interconnection agreements and has come to be known as the “opt in” rule.

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<sup>71</sup> The positions and arguments of the parties with respect to SBC’s compliance with its opt-in obligations, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 214-216, 288, 310-312 and 323-324.

CLECs asserted that one example of SBC's failure to allow CLECs to opt in to the provisions of other carriers' agreements came to light when an SBC witness was asked whether a CLEC could opt into Section 5.7.2 of the SBC Illinois/McLeodUSA interconnection agreement pursuant to Section 252(i). Section 5.7.2 provides that if SBC has approved tariffs on file for interconnection or wholesale services, the CLEC may, at its discretion, purchase SBC services from its interconnection agreement and/or the approved tariffs.

In response, SBC submitted an on-the-record data request response indicating that a CLEC could not opt in to Section 5.7.2 because "it is not an individual 'interconnection, service, or network element arrangement' that is available for adoption pursuant to Section 252(i) of the Act." This position, the CLEC's argued, is in direct violation of Sections 252(i), and 251(c)(2) of the Act.

### **ICC Analysis and Conclusion – General Opt-In Restrictions**

WorldCom and AT&T made much of a single opt-in data request put to SBC at the hearing and in the abstract (i.e., outside of a real-life negotiation). Neither party analyzed or discussed the matters set out in SBC's written response. The CLECs would have the ICC infer that on the basis of this isolated instance, the Company denies CLECs important opt-in rights. The ICC found, however, that the evidence does not support the intended conclusion. Accordingly, the ICC did not find any violation by SBC of its obligation to allow CLECs to "opt in" under Section 252(i) of the Act.

## **5. Collocation Rates**

Both Staff and AT&T raised questions concerning the interim nature of SBC's collocation rates and the compliance of those rates with TELRIC pricing rules.<sup>72</sup> The ICC investigated SBC's tariffed collocation rates in Docket No. 99-0615 where it found that the cost studies supporting those proposed rates to overstate costs, adopted Staff's proposed collocation rates as interim rates, and ordered SBC to "file new cost studies based on an efficient, forward-looking environment". ICC Order at 23, 27, Docket 99-0615. The order in Docket 99-0615 was affirmed on appeal in *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 327 Ill. App. 3d 768 (3d Dist. 2002).

Staff viewed SBC's collocation rates to be in technical but not full compliance with the requirements of Section 251. Although SBC filed a new cost study as ordered in Docket No. 99-0615, Staff noted that SBC did not revise its tariffs and the investigation contemplated by the ICC did not occur. Full compliance, in Staff's view, would require that SBC file rates based upon its cost study as this will enable the ICC to evaluate its rates and cost study, and establish permanent rates. AT&T contended that because SBC's current tariffed rates for cageless and shared cage collocation are only interim in nature, such are not TELRIC-compliant. AT&T pointed out that the ICC's Order in Docket No.

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<sup>72</sup> The positions and arguments of the parties with respect to SBC's compliance with its collocation pricing requirements, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 188-191, 209-213, 267-270 and 333-336.

99-0615 adopting Staff's proposed rates noted they were not perfect, and anticipated another docket "to more fully examine the cost studies relating to the pricing of services supporting collocation." As such, AT&T argued, it cannot be maintained that SBC's rates for all of its collocation services, including the numerous rate elements for shared cage and cageless collocation, are TELRIC-compliant.

AT&T argued that SBC has not shown that the interim rates in question meet the FCC's interim rate criteria. AT&T contended that SBC has failed to demonstrate (consistent with the FCC's view on the use of interim rates) that its interim collocation rates are reasonable. AT&T also asserted that there is no provision or requirement in place to true up these interim collocation rates, as the FCC's criteria require. According to AT&T, the ICC adopted the Staff's rates as interim rates, but these did not result from any independent cost studies proposed by Staff. AT&T contended that the reduction of SBC's proposed rates by a factor of 50% across the board hardly results in a "reasonable" rate sufficient to satisfy Section 252(d)'s pricing requirements or the FCC's interim rate criteria. Consequently, AT&T disagreed that SBC's interim rates are in technical compliance with Section 251.

In response, SBC asserted that while the ICC originally designated these rates as "interim" pending review of revised cost studies, such rates have now been in effect for more than two years without further ICC action and, as a result, should be considered to be de facto permanent rates. SBC further argued that even if one were to consider the current rates to be "interim," the FCC accepts interim rates in Section 271 application proceedings. SBC asserted that Staff's position that SBC should have filed a tariff based on the new costs to be unsupported by the language of the Order in Docket No. 99-0615.

SBC asserted that it has complied fully with the Order in Docket No. 99-0615 by filing the updated cost studies. SBC contended that the ICC clearly contemplated that it would initiate the investigation into these studies and would set permanent rates after the investigation was complete. For reasons unknown, SBC contended, this investigation was never initiated. Given these circumstances, however, SBC submitted that it is wrong to try to shift the onus to SBC.

### **ICC Analysis and Conclusion – Collocation Rates**

The ICC found some of SBC's points to be valid pertaining to the permanency of its collocation rates. SBC's collocation rates are not "interim" in the sense intended by the FCC because they are not un-reviewed rates that were allowed to go into effect pending the resolution of a rate controversy. Rather, those rates were fully investigated and established by the ICC in Docket No. 99-0615. Although the ICC may, in the future, establish new collocation rates based on updated or new cost studies, this does not make SBC's current collocation rates interim or temporary for Section 271 purposes.

## **6. Adjacent Collocation Intervals**

Several parties, including Staff, argued that SBC failed to demonstrate that it was obligated to provide adjacent collocation within a definite time interval.<sup>73</sup>

SBC maintained that adjacent collocation is not subject to standard provisioning intervals. SBC noted that in the *Collocation Waiver Order* the FCC concluded that a New York collocation tariff was generally consistent with its goals, even though that tariff did not establish standard intervals for adjacent collocation. According to SBC, adjacent collocation is a sufficiently unique arrangement such that additional engineering work is likely to be required beyond what is contemplated by the standard 90-day collocation interval for physical collocation. Thus, SBC contended, it should be dealt with in the same manner as “Raw Space.” Under the FCC’s rules, SBC observed, adjacent collocation is essentially a “last resort” physical collocation arrangement. That is, an ILEC is required to provide adjacent collocation only when physical collocation space is legitimately exhausted (e.g., where the office is “closed” to physical collocation and posted on the Company’s website as such). According to SBC, no Illinois CLEC has ever requested adjacent collocation.

AT&T disagreed with SBC’s position that “adjacent collocation is not subject to standard provisioning intervals.” AT&T asserted that the ICC already ordered SBC to tariff adjacent collocation as a standard offering just as its affiliate, SWBT, has done in Texas, including standard provisioning intervals. AT&T contended that the ICC’s Order in Docket No. 99-0615 required SBC to provide adjacent collocation as a standard offering, including standard intervals, to cure the very CLEC uncertainty regarding timing and resources about which McLeodUSA complained during the ICC’s 271 investigation. AT&T pointed out that the ICC specifically found that “requiring Ameritech to provide adjacent on-site collocation as a standard offering will help eliminate the risk of discrimination since all CLECs will be paying the same amount of money and are subject to the same intervals, terms and conditions.” Order at 11-12, Docket No. 99-0615, (August 15, 2000). Thus, AT&T contended that SBC fails to comply with the requirements of Checklist Item 1.

### **ICC Analysis and Conclusion – Adjacent Collocation Intervals**

More than two years have passed since SBC amended its collocation tariff to comply with the Order in Docket No. 99-0615. At no time in this period was the ICC notified of any problem with said tariff relative to a provisioning interval. The ICC declined to find SBC non-compliant with the Order in Docket No. 99-0615 in its 271 analysis, given that it directed SBC to provide adjacent on-site collocation “as SWBT does in Texas” and the SWBT collocation tariff did not provide any installation intervals for adjacent collocation. Further, the ICC found that the FCC does not require a standard provisioning interval for adjacent collocation; thus, the matter at hand did not impinge on its assessment of SBC’s compliance with its obligations under Section 271.

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<sup>73</sup> The positions and arguments of the parties with respect to SBC’s compliance with its adjacent collocation obligations, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 186-187, 297-298 and 320-322.

## 7. Direct Trunking Policy

### *Direct End Office Trunking:*

AT&T contended that SBC's direct trunking policy was not in compliance with its obligations under the 1996 Act.<sup>74</sup> AT&T took issue with SBC's policy that every time the traffic between a CLEC switch and an SBC end office reaches the level of "1 DS1" the CLEC should establish direct end office trunking to that end office. AT&T contended that SBC's policy is contrary to a CLEC's right to select the locations at which it interconnects with SBC's network. AT&T acknowledged that there are limits on a CLEC's ability to request interconnection, but maintained that the burden is on the ILEC to prove that such limits should be imposed. The applicable standard, AT&T asserted, is technical feasibility. The FCC has stated that in order for an ILEC to justify refusal to provide interconnection or access at a point requested by another carrier, it "... must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access." *Local Competition Order*, ¶ 203.

According to AT&T, SBC has made no such showing of a "significant adverse impact." AT&T argued that a temporary or single spike in traffic volume that later falls under the DS-1 threshold does not rise to the standard set by the FCC of a "significant adverse impact" to SBC's network. AT&T contended that by forcing CLECs to go to the end office rather than terminate at the tandem, SBC is placing arbitrary limits upon a CLEC's right to interconnect at any feasible point in the ILEC's network. According to AT&T, it should not be required to establish a point of interconnection for its traffic at an SBC end office when the traffic to that end office reaches an arbitrary threshold (i.e., one DS1) established by SBC.

In AT&T's view, proper forecasting and the deployment of additional tandem switching capacity can avoid tandem exhaustion. Even if SBC must bear the cost to deploy additional tandem capacity in its network to accommodate interconnection at its tandem switches, that increased cost does not meet the "significant adverse impact" standard established by the FCC. AT&T noted that the FCC acknowledged that ILEC interconnection obligations might require ILECs to modify their network to accommodate interconnection in its *Local Competition Order*, ¶ 202.

In response, SBC explained that its network contains both "end" offices and "tandem" offices. SBC further explained that where a CLEC uses a SPOI in a LATA and one of the CLEC's end users calls an SBC end user within that LATA, the CLEC's network carries the call to the SPOI. From the SPOI, the call is generally routed, or "trunked," to an SBC tandem office. SBC's tandem switch will then route the call to the appropriate end office, where the local switch routes the call to the end user.

A tandem switch however, SBC noted, has a limited amount of capacity. If all calls within a LATA were routed to one SBC tandem office, and if the volume

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<sup>74</sup> The positions and arguments of the parties with respect to SBC's direct trunking policy, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 161-168, 231-239, 255-258, 285-287, and 327-328.

of those calls were to exceed the tandem office's switching capacity, the tandem switches there would be "exhausted." Therefore, when the level of traffic from a SPOI that leads to a specific end office reaches a certain level, in the Company's opinion, sound engineering practice dictates that direct trunks be installed from the SPOI to the end office, in lieu of routing the traffic indirectly through the tandem switch. SBC maintained that the existing DS1 threshold (24 trunks or POTS lines) is unquestionably nondiscriminatory given that SBC uses a more demanding threshold (17 trunks) for establishing direct trunks in its own network.

SBC further noted that the ICC expressly upheld the DS1 level threshold for direct end office trunking in the SBC Illinois/Verizon Wireless arbitration. Order at 6-7, Docket No. 01-0007 (May 1, 2001). SBC argued that the ICC also found that "tandem exhaust is a significant problem in Illinois," and that SBC had justified a threshold level of one DS1 for the establishment of direct end office trunking. *Id.* According to SBC, this finding fully addresses AT&T's assertion that SBC's direct end office trunking policy can only be sustained if SBC can show that "significant adverse impacts" would otherwise result. According to SBC, AT&T provided no reason for the ICC to depart from its previous decision. SBC also disagreed with AT&T's claim that its direct end office trunking policy raised a SPOI issue. A "single point of interconnection," SBC maintained, refers only to the physical point at which two networks are connected. *See Pennsylvania 271 Order* at 100. SBC also argued that the FCC confirmed that direct trunking does not entail establishing a new or different point of interconnection because the physical point of interconnection does not change (and may still be chosen by AT&T). *See, Verizon Virginia Arbitration* at 91. Even if AT&T must compensate SBC for the costs incurred in establishing direct trunking, SBC argued, it could still obtain physical interconnection at a SPOI.

***Transit Traffic:***

AT&T noted SBC to take an almost identical position on transit traffic as it does on direct end office trunking, requiring a CLEC to establish direct trunking to a third party carrier when traffic between the CLEC and another third party carrier reaches one DS1. The transit service at issue here AT&T contended, is the tandem switching and common transport provided by SBC for the exchange of local and intraLATA toll traffic between AT&T and LECs other than SBC. AT&T maintained that SBC has an obligation to provide transit service to AT&T for the exchange of local traffic with other carriers, regardless of the level of traffic exchanged between AT&T and the other carriers. AT&T also argued that the imposition of a capacity restriction violates SBC's obligation because it takes away AT&T's right, pursuant to Section 251(a)(1), to interconnect indirectly with the facilities and equipment of other carriers, as well as SBC's Section 251(c)(2)(B) obligations to provide interconnection at any technically feasible point. AT&T argued that the ICC already ordered SBC to tariff and provide non-restricted transiting in our Order in Docket Nos. 96-0486/0569. AT&T asserted that even if SBC must bear the cost to deploy additional tandem capacity to its network to accommodate indirect interconnection at its tandem switches, that does not meet the "significant adverse impact" established by the FCC.

SBC contended that the same analysis that applies to direct end office

trunking defeats AT&T's allegation that SBC Illinois has not supported its requirement of direct trunking with a third party carrier when the level of traffic reaches the DS1 level. SBC also argued that it does not have an obligation to provide transit service. In the recent Verizon Virginia Arbitration the FCC held that "the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under [section 251(c)(2)], nor do we find clear Commission precedent or rules declaring such a duty."

### **ICC Analysis and Conclusion – Direct Trunking Policy**

AT&T complained of SBC's failure to show that its DSI-1 standard is not arbitrary. In the arbitration action between SBC and Verizon (Docket No. 01-0007), SBC provided the requested showing which justifies the DS1 threshold to be used when exchanging traffic between the two companies. The ICC declined to adjudicate that issue anew in its assessment of SBC's compliance with Section 271. Since the DS1 threshold was established in an arbitration case between SBC Illinois and Verizon only, the ICC viewed this issue as requiring fact-specific findings that are likely to vary depending on the companies involved. For purposes of the 271 proceeding, however, the ICC did not find SBC's direct trunking policy to constitute non-compliance with its obligations under Checklist Item 1.

## **8. Negotiation Process**

McLeodUSA and TDS Metrocom argued that SBC does not comply with its obligation to negotiate interconnection agreements ("ICAs") in good faith.<sup>75</sup> McLeodUSA complained of the difficulties it experienced in agreement negotiations with SBC and provided testimony that the negotiations were delayed owing to SBC Illinois' lead negotiator being unfamiliar with McLeod's existing resale agreements. McLeod further contended that problems arose because the SBC negotiator had little discretion to deviate from the template agreement and no authority to make final decisions on law, policy, or operations. To the extent that Subject Matter Experts (SMEs) need to make final decisions, McLeod believes SBC should have these individuals present at the negotiations. Finally, McLeod argued, the version of the agreement filed by SBC for the arbitration had a large number of language changes that were not made known to McLeod during the negotiations. McLeod contended that SBC has no processes in place to enable good faith CLEC negotiations.

SBC maintained that the facts do not support either the argument that SBC violated its duty to negotiate in good faith or the more expansive allegation that SBC generally violates that duty. SBC noted that the SBC/McLeodUSA interconnection agreement is a complex and long document, that parties are bound to have some disagreements, and that the parties resolved 70 of 85 issues prior to the hearing. In SBC's view, McLeodUSA got an interconnection

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<sup>75</sup> The positions and arguments of the parties with respect to SBC's good faith negotiation of ICAs, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 251-252, 271-274, 309 and 329-332.

agreement using the very process established by the Act for reaching such agreements.

SBC also viewed McLeodUSA's characterization of the negotiation events to be incorrect. SBC commented that the resale agreement was ultimately concluded to McLeodUSA's satisfaction. SBC noted that McLeodUSA ultimately conceded that most of the language changes were not material, and all were corrected to McLeodUSA's satisfaction. Finally, SBC argued that McLeodUSA's contention that the SBC negotiators had little authority to deviate from the SBC template agreement does not bear on the issue of good faith. SBC also asserted that its negotiators do have authority to make binding representations and decisions, although they are not free to unilaterally create new provisions for interconnection agreements. This is as it should be, SBC maintained, given that multi-state "MFN" obligations require SBC Illinois to coordinate its position with affiliates. SBC also asserted that it has implemented significant changes in the negotiation process, and that individual negotiators now receive training in order to increase their overall effectiveness.

### **ICC Analysis and Conclusion – Negotiation Process**

In the ICC's view, McLeodUSA's singular negotiation experience is not enough to indict SBC on a failure of good faith action, especially given the steps taken by SBC to implement improvements at its end. The ICC expressed its expectations for SBC to continuously maintain and update the training of its negotiating staff and did not find a violation of its duty to negotiate in good faith.

### **E. Performance Data Review**

In Phase II of the ICC's investigation, it reviewed SBC's actual performance data for compliance with Checklist Item 1.<sup>76</sup> No CLEC raised any performance issues in the Phase II proceeding specific to Checklist Item 1. Accordingly, the ICC found that SBC's commercial performance results demonstrate that SBC satisfies the requirements of Checklist Item 1 with respect to interconnection and collocation. For informational purposes, the performance data results are briefly summarized below.

#### *Summary of Actual Performance Data Results*

SBC passed each of the ten performance measurements that address the operating quality of existing interconnection trunks (in terms of the percentage of calls blocked) and the timely provisioning of new interconnection trunks in at least two of the three study period months. SBC Illinois satisfied the benchmark for the rate of call blockage in all three months of the study period, and for the period as a whole, only 0.01% of the more than 315 million total calls captured by the sampling process were blocked. SBC Illinois did not miss a single due date

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<sup>76</sup> The positions and arguments of the parties with respect to SBC's actual performance data for Checklist Item 1, as well as our analysis and conclusions, are contained in our Final Order at paragraphs 342-364.

for the 2,187 non-project orders for new installations reported during the study period, and it met the benchmark for project orders in two of the three months. Over the study period as a whole, SBC Illinois completed 96.8% of 25,608 trunk project orders within the requested due date. Further, the average installation interval for CLEC interconnection trunks (24.15 days), was about half the average interval of 48.09 days for SBC Illinois' own interoffice trunks.

SBC Illinois did not miss a single collocation due date, and thus there were no "delay days" to measure. SBC processed every CLEC request for cageless collocation and for new physical collocation within the established timeframes, and, for additions to existing collocation arrangements, processed 100 of the 101 requests within the established timeframes – a rate of 99.01%.

#### **F. ICC Findings and Recommendation – Checklist Item 1**

On the whole of the investigative record in Docket No. 01-0662, the ICC found SBC Illinois to be compliant with Checklist Item 1.

In reaching this conclusion, the ICC reviewed and considered issues of State law compliance as raised by Staff and other parties. As such, and at the outset, Staff maintained that SBC had not adequately addressed its compliance with collocation obligations imposed under Section 13-801 of the Illinois PUA. Subsequent to the filing of initial briefs in Docket No. 01-0662, Staff and SBC entered into a Stipulation in which Staff indicated that it had reviewed SBC's compliance tariff on collocation in Docket No. 01-0614 and found it adequate. As such, the ICC's Phase I Order recognized a single SBC Illinois Checklist Item 1 compliance issue. To be specific, and in accord with Staff's recommendations, the ICC found in Phase 1 that SBC Illinois' compliance with the collocation requirements of Docket No. 01-0614 should be monitored and confirmed in Phase II of Docket No. 01-0614.

In the Phase II investigative proceeding, Staff agreed that SBC Illinois had made the required showing and noted that no CLEC disputed that evidence. Thus, the ICC concluded that SBC was in compliance with the requirements of the collocation tariff.

### **CHECKLIST ITEM 2 – UNBUNDLED NETWORK ELEMENTS, OSS, PRICING.**

#### **A. Standards for Review**

Section 271 (c)(2) (B) (ii) of the Act requires that a section 271 applicant provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251 (c)(3) and 252(d)(1)." 47 U.S.C. § 271 (c)(2)(B)(ii). This requirement of Checklist Item 2 is divisible into three major components – Unbundled Network Elements ("UNEs"), the pricing for UNEs ("Pricing") and Operations Support Systems ("OSS").

## **UNEs**

The ILEC must provide CLECs with nondiscriminatory access to UNEs at any technically feasible point, on terms and conditions that are just, reasonable, and nondiscriminatory. Further, ILECs must provide UNEs in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service.

## **UNE Pricing**

ILECs must provide CLECs with UNEs at rates that are just, reasonable, and nondiscriminatory. State commissions determine such rates, which must be cost-based, and may include a reasonable profit. The FCC has directed state commissions to develop UNE rates based upon the total element long-run incremental cost (TELRIC) of providing such UNEs. If the ILEC's rates comply with basic TELRIC principles, they are deemed satisfactory for Section 271 purposes.

## **OSS**

The FCC has determined that ILECs must offer CLECs nondiscriminatory unbundled access to systems, databases, and personnel to provide service to their customers (collectively, "OSS"). To determine whether an ILEC's offering is nondiscriminatory, the FCC reviews, for preference, actual commercial results, or, if these are not available, carrier-to-carrier testing. Individual or minor disparities in OSS performance are not a basis for denial of section 271 authority, unless they persist over time.

The FCC has determined that "access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide UNEs under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable."<sup>77</sup>

The FCC utilizes a two-step approach to analyzing whether a BOC has met the nondiscriminatory requirements for each OSS function. First, it determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."<sup>78</sup> Under this requirement, a BOC must show that it has developed sufficient electronic and manual interfaces to allow competing carriers equivalent access to all of the needed OSS functions. It must provide necessary specifications, disclose any required business rules or information needed to assure that a provider's orders may be processed efficiently, and it must demonstrate that its OSS is designed to accommodate both current and projected demand for these OSS functions.

Second, the FCC must determine "whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter."<sup>79</sup> Under this

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<sup>77</sup> See New York Order, ¶¶84-89.

<sup>78</sup> Id.

<sup>79</sup> Id. .

criteria, the FCC may examine performance measurements and other evidence of commercial readiness to determine whether the BOC's OSS is able to handle current and projected demand. "The most probative evidence that OSS functions are operationally ready is actual commercial usage."<sup>80</sup> Third party testing may also provide evidence of commercial readiness and viability. "Absent sufficient and reliable data on commercial usage, the Commission will consider the results of carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the commercial readiness of a BOC's OSS."<sup>81</sup> To the extent that performance measurements are utilized in this inquiry, the FCC has indicated that it "looks at the totality of the circumstances and generally does not view individual performance disparities, particularly if they are isolated and slight, as dispositive of whether a BOC has satisfied its checklist obligations."<sup>82</sup>

The FCC requires ILECs to maintain OSS systems that permit CLECs to place orders, install service, maintain service, and bill customers in substantially the same time and manner as the ILEC, unless there is no retail analog for a service, in which case OSS access must be afforded in a manner which offers the CLEC a meaningful opportunity to compete. The FCC analyzes OSS in two phases: first, it determines whether the ILEC has made its OSS available to CLECs, and second, it determines whether the OSS are operationally ready, as a practical matter. The FCC also considers results of carrier-to-carrier testing.

## **B. The State Perspective**

The ICC has addressed SBC's OSS in several proceedings.<sup>83</sup> It has also reviewed UNE pricing in several dockets.<sup>84</sup>

## **C. UNEs**

### **1. SBC Illinois' Demonstration of Compliance – UNEs**

SBC Illinois maintained that the extensive use of UNE combinations by CLECs shows that the company (i) provides UNEs in a manner that allows

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<sup>80</sup> Id.

<sup>81</sup> Georgia/Louisiana Order, Appendix D, ¶31.

<sup>82</sup> Id.

<sup>83</sup> See Order, AT&T Communications of Illinois, Inc.: Petition for a total local exchange wholesale service tariff from Illinois Bell Telephone Company d/b/a Ameritech Illinois and Central Telephone Company pursuant to Section 13-505.5 of the Illinois Public Utilities Act. LDDS Communications, Inc. d/b/a LDDS Metromedia Communications: Petition for a total wholesale network service tariff from Illinois Bell Telephone Company d/b/a Ameritech Illinois and Central Telephone Company pursuant to Section 13-505.5 of the Illinois Public Utilities Act, ICC Docket No. 95-0458/0531 (consol.) (June 26, 1996); Order, SBC Communications Inc. et al., Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois and the Reorganization of Ameritech Illinois Metro, Inc. in Accordance with Section 7-204 of the Public Utilities Act and All Other Appropriate Relief, ICC Docket No. 98-0555 (September 23, 1999); Order, Illinois Bell Telephone Company, et al., Joint Submission of Amended Plan of Record for Operations Support Systems ("OSS"), ICC Docket No. 00-0592 (January 24, 2001).

<sup>84</sup> See TELRIC Order, TELRIC II, TELRIC 2000 Order, Line Sharing Orders.

CLECs to combine them in accordance with Section 251(c)(3), (ii) does not separate UNEs already combined (by providing existing combinations) except upon CLEC request, and (iii) combines UNEs at a CLEC's request in accordance with applicable FCC rules. SBC Illinois further asserted that its collocation arrangement offerings allow CLECs to combine UNEs. SBC stated that existing combinations are provided via "migration" of existing retail services, and asserted that no CLEC disputed this fact.

SBC Illinois also observed that neither Staff nor any CLEC identified any existing combination (other than the UNE-P and Enhanced Extended Links ("EELs") already identified) in which CLECs might be interested. SBC Illinois also contended that if a CLEC did desire other existing UNE combinations, it could request them through the Bona Fide Request ("BFR") process. SBC Illinois also noted that it filed a compliance tariff in ICC Docket No. 01-0614 (without waiving its legal rights to challenge that decision) that contains procedures for conversion of private line service, or point-to-point data circuits, to UNEs. SBC Illinois contended that Staff's "availability analysis" would have the ICC now adopt a completely new set of rules for UNEs. SBC Illinois noted the Stipulation it entered into with Staff, mooted Staff's concerns regarding the availability of UNE combinations migrations, new UNE combinations, and the BFR process. Finally, SBC Illinois maintained that its existing tariff contains numerous standards and measures (including installation intervals) for UNE combinations.

## **2. Parties' Positions, Arguments, and Evidence**

### **UNE Combinations**

Initially, Staff contended that SBC Illinois interprets the FCC's national list of UNEs narrowly, and that we should monitor SBC Illinois' BFR process to determine whether the Company is requiring carriers to submit BFR requests for UNEs that should be provided outside this process. Staff further questioned whether SBC Illinois had demonstrated that its BFR charges were TELRIC compliant, or that its BFR process resulted in timely provisioning of UNEs. Staff noted that the BFR process had not been used for newly defined UNEs. Staff recommended increased monitoring of SBC Illinois' provisioning processes, and each step of its BFR process. Staff contended that SBC Illinois' offerings were unclear with respect to what types of "migrations" are available, what the cost for each type is, and what provisioning intervals will apply. Staff subsequently declared that its concerns on these matters were resolved by SBC Illinois' compliance filing in response to the Order in ICC Docket 01-0614.

Staff then contended that SBC Illinois' nonrecurring charges for UNEs and UNE combinations were not clear and easily ascertainable as required by our TELRIC II Order. Staff further indicated that SBC Illinois does not have any established interval for provisioning conversions of special access circuits to combinations of UNEs, nor performance measures to track its provisioning of migrations. Similarly, Staff contended that SBC Illinois does not have any established interval for provisioning new combinations of loop and transport, nor

performance measures to track provisioning of such new combinations. Staff indicated that the Stipulation entered into with SBC Illinois does not resolve cost, timeliness or quality issues for UNE conversions and new combinations.

### **UNE Combination Rate Clarity**

The ICC's Phase I Order required SBC Illinois to demonstrate that its UNE rates are clearly defined by providing examples of typically requested UNE arrangements and explaining how those services and products would be billed. SBC Illinois explained that it had filed tariffs in response to the Commission's orders in the TELRIC Compliance Docket (Docket No. 98-0396) that set forth with specificity the nonrecurring charges ("NRCs") that apply when various UNE combinations are ordered. SBC Illinois also presented 20 possible scenarios of UNE-P combinations and the NRCs that would apply to each scenario. (SBC Ex. 7.0 (Silver Phase I Compliance Aff.), ¶¶ 22-25).

In reply, Staff took the position that SBC Illinois' EEL tariff was not entirely clear on when certain NRCs apply. (Staff Ex. 32, ¶¶ 147-48). Staff then recommended that SBC Illinois take steps to ensure that information regarding the applicability of recurring and non-recurring UNE-P charges is available to CLECs in Illinois. (Id. ¶ 149).

In rebuttal, SBC Illinois agreed to clarify its EEL tariff and to add matrices to the CLEC Online Handbook to further explain the application of EEL and UNE-P charges. (SBC Ex. 7.1 (Silver Phase I Rebuttal Aff.), ¶¶ 4-8, 12). Staff accepted SBC Illinois' proposals as long as they were implemented during the proceeding (Staff Ex. 44.0, ¶ 35) and SBC Illinois committed to do so. (SBC Ex. 7.2 (Silver Phase I Compliance Surrebuttal Aff.), ¶ 32).

### **Opt-In Policy**

Staff stated that SBC Illinois appears to have complied with the ICC's Phase I directive regarding clarification of its opt-in policy, while noting that this does not ensure compliance with that policy. On final review, Staff concluded that posting of the policy on the SBC CLEC website was a suitable resolution.

### **EELs**

At the outset, the ICC had directed SBC to provide information that explains how SBC Illinois does and will measure provisioning intervals and service quality for its EELs products, and requested Staff to assess this information. Staff informed us that it is impossible to verify whether the Company has measured provisioning of all EELs it has provided to CLECs, or to verify that the Company has provided EELs in a manner that will not impair or impede CLEC's ability to use EELs to compete in Illinois. SBC Illinois then proposed tariff changes to remedy this problem. Because SBC Illinois' proposed EELs measurements do not account for its own EEL certification process, however, Staff contended that they do not effectively measure the company's performance in providing EELs.

In order to ensure that SBC Illinois is effectively measuring its performance in providing EELs in Illinois, Staff proposed that the Company

specifically account for its conversion certification process (and any similar certification processes applied to new EELs) in its performance measurement system.

### **3. Performance Data Review**

SBC Illinois explained that, even with the enormous volume of CLEC UNE-P orders (with more than 340,000 UNE-P service orders in the three months in the study period), it had provisioned UNE combinations on a timely basis, and with high quality installations and repairs. UNE-P orders fall into four categories: residential and business, both with and without fieldwork. SBC Illinois explained that three of the categories account for nearly all UNE-P orders (about 99.7%), and the fourth category (business UNE-P that requires fieldwork) experiences a small volume of activity (about 0.3%). (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal Aff.) ¶ 66.) For the three categories that account for the vast majority of UNE-P orders, SBC Illinois stated that there are no performance disputes, as SBC Illinois' performance results showed better-than-parity performance for all three months for timely installations, installation trouble reports, time to restore service, and repeat trouble reports.

SBC Illinois stated that the chief issue concerning UNE combinations is limited to the fourth category, business UNE-P that requires fieldwork. SBC Illinois explained that, with respect to this fourth category, it did not meet the parity standard for a limited number of sub-measures, but the shortfalls were insignificant and, given the small volume at issue (about 0.3% of the reported UNE-P volume), do not affect checklist compliance.

SBC Illinois noted that it performed better than parity with respect to the average installation interval for all four UNE-P categories, including business UNE-P that required fieldwork. While the rate of missed due dates for the fourth category was slightly higher than parity in two months, SBC Illinois explained that the difference was negligible – only about 1%, which translates to only 6 missed due dates in October and 8 in November. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal Aff.) ¶ 66.) Moreover, SBC Illinois explained, the reported shortfall was caused at least in part by a defect in the process of assigning due dates, whereby such orders were sometimes assigned a date three days early. (Id. ¶ 68.)

SBC Illinois stated that it also did not meet the parity standard for the rate of installation trouble reports for the fourth category, but that shortfall was immaterial – SBC Illinois fell short of parity by just 10 installation trouble reports. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 177.) Further, SBC Illinois explains that it has instituted improved procedures and, as a result, achieved parity performance for December 2002 and January 2003. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal Aff.) ¶ 69.)

Finally, SBC Illinois noted that it did not meet the parity standard for the trouble report rate for UNE-P business lines (PM 37-04), but explained that CLECs experienced a low trouble report rate for UNE-P business lines (ranging from 0.59 to 0.86 reports per 100 loops), and the shortfalls from parity were immaterial (ranging from 0.04 to 0.11 trouble reports). (SBC Ex. 2.0 (1/17/03 Ehr

Aff.) ¶ 179; SBC Ex. 2.2 (3/3/03 Ehr Rebuttal Aff.) ¶ 70.) In any event, SBC Illinois has instituted measures to improve performance, and proposes additional monitoring of PM 37. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal Aff.) ¶ 70; SBC Ex. 2.3 (Ehr Surrebuttal) ¶ 68.)

#### **4. ICC Analysis and Conclusion**

##### **Opt-In Policy**

The ICC concluded the Phase I Order with requirements that SBC Illinois demonstrate that the UNE offerings in its existing interconnection agreement and tariffs can generally be opted-into without unnecessary restrictions. SBC Illinois provided a detailed explanation of its opt-in policies relative to the UNE sections of interconnection agreements, and its policies allowing CLECs to incorporate UNE tariff offerings by reference, including all associated rates, terms and conditions, into a new or existing interconnection agreement. (SBC Ex. 3.0 (Alexander Phase I Compliance Aff.) ¶¶ 3-10; SBC Ex. 3.1 (Alexander Rebuttal Aff.) ¶ 3). In response to Staff's request for a written commitment from SBC Illinois in this regard, SBC Illinois proposed that language be added to its CLEC Online website to set forth these policies. (SBC Ex. 3.1 (Alexander Phase I Rebuttal Aff.) ¶¶ 4-5). Staff withdrew its prior recommendation and accepted SBC Illinois' proposal, contingent on SBC Illinois' submission of the proposed language in its Surrebuttal affidavits. (Staff Ex. 44.0, ¶ 28). SBC Illinois complied with Staff's request. (SBC Ex. 3.2 (Alexander Phase I Surrebuttal Aff.), ¶ 5, Schedule SJA-1).

##### **UNE Combinations**

The ICC agreed that the Stipulation (and the underlying tariff filing) adequately addressed and resolved the issues related to SBC's BFR process and its provision of new UNEs, as well as issues raised regarding New UNE Combinations and UNE Combination migrations.

##### **EELs**

The record in Phase II of this proceeding shows that SBC Illinois cannot supply enhanced extended loop ("EEL") provisioning information separately from stand-alone loop provisioning information.

In order to ensure that SBC Illinois is effectively measuring its performance in providing EELs in Illinois, the ICC required that the Company specifically account for its conversion certification process (and any similar certification processes applied to new EELs) in its performance measurement system. The ICC agreed that the timely and effective provisioning of EELs is an important matter, and found merit to Staff's recommendations. Accordingly, the ICC directed SBC Illinois to add an additional diagnostic measurement to its performance measurements that assesses the duration of its certification process, and that meets with Staff's approval.

## **Performance Data Review**

In its Final Order in Docket No. 01-0662, the ICC found that SBC Illinois provides CLECs nondiscriminatory access to UNE combinations, including the UNE-P, in accordance with the requirements of Checklist Item 2. SBC Illinois' performance results show that it is processing a high volume of CLEC UNE-P service orders and achieving, on a whole, better than parity results.

The ICC noted that SBC Illinois' failure to meet a handful of sub measures relating to business UNE-P with fieldwork orders was not significant overall. According to reasonable analysis standards, checklist compliance cannot be assessed simply and only by focusing on the few sub-measures that show a shortfall. SBC Illinois' performance results showed that it provided CLECs service that is better than parity for more than 99% of UNE-P service orders.

The ICC noted that the performance shortfalls with respect to business UNE-P with fieldwork were slight and affected a very limited number of UNE-P service orders. Taking account of the whole of the showings, the ICC concluded that SBC Illinois demonstrated checklist compliance with respect to the UNE Platform.

Nevertheless, the ICC determined that PM 37-4 would need to be improved and monitored. It therefore required SBC Illinois to demonstrate substantially improved performance on this measure by November 2003 or face additional penalties.

## **D. UNE PRICING**

### **1. SBC Illinois' Demonstration of Compliance - UNE Pricing**

SBC asserted that its UNE and interconnection rates comply with all FCC and statutory requirements. The Company noted that the ICC has diligently applied TELRIC principles with respect to SBC's rates. This point is well demonstrated by the fact that Illinois loop rates are lower than the national average and lower than several states where Section 271 approval has recently been granted. SBC indicated that the ICC has reviewed and where needed, set rates for most SBC UNEs through several orders, including the TELRIC Order, the TELRIC II Order, the TELRIC 2000 Order and the several Line Sharing Orders. SBC further indicated that Section 271 does not contemplate a de novo review of state Commission rate proceedings, but rather a determination of whether TELRIC principles were used.

SBC further indicated that a small number of its UNE and interconnection rates have not been fully reviewed by the ICC and are thus, interim in nature, including rates for the end-to-end broadband UNE<sup>85</sup>, and for certain UNE combinations including UNE-P and EELs. SBC observed Staff and CLECs to have argued that it should not receive Section 271 approval until rates for these products have been subjected to ICC review. These arguments should be

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<sup>85</sup> Also referred to in the Order as the "NGDLC UNE-P".

rejected, SBC argued, since the FCC has determined that not all UNE rates need be permanent for Section 271 approval. SBC pointed out that interim rates satisfy Section 271 requirements if they fall within a “zone of reasonableness”, based on whether 1) the rates are reasonable; 2) the state Commission has shown a commitment to apply TELRIC principles; and 3) provision is made for a “true-up” when permanent rates are implemented. SBC asserted that its interim rates meet each of these requirements, with the exception of one NRC for UNE-P. This does not matter, SBC alleged, as this rate does not account for certain costs it incurs.

In response to the complaints of Staff and AT&T regarding SBC’s rates for subloops, dark fiber, and CNAM queries (as the ICC has not yet opened an investigation into these rates), SBC asserted that rates for these UNEs currently exist in tariffs that have been on file for nearly a year and a half, during which time no party has formally requested an ICC investigation. The FCC has made clear that a few unresolved pricing disputes will not undermine a Section 271 application. These rates are TELRIC-compliant in any event, the Company argued, as the studies supporting them use ICC-approved assumptions, and likewise satisfy the “zone of reasonableness” test, given that they compare favorably to rates approved in Wisconsin and Michigan. The Staff argument that Michigan NRCs are higher, should be rejected, SBC claimed, since Michigan rates include additional rate elements, and thus are not directly comparable. SBC urged rejection of Staff’s argument that SBC sub-loop rates are unreasonable because in some cases they exceed rates for the whole loop. SBC contends that this is due to use of different cost studies to support loop and sub-loop rates, and different rate elements accounted for in the studies.

## **2. Parties’ Positions, Arguments, and Evidence**

Staff averred that SBC has filed rates consistent with the TELRIC II Order, and ULS issues associated exclusively with the TELRIC Order, as well as line sharing rates consistent with the Line Sharing Orders. Staff, however, considered that SBC’s rates for NGDLC UNE-P do not comply with the Line Sharing Orders. Staff noted that the dark fiber unbundling proceeding was dismissed by agreement, and a tariff “passed to file”. There was no agreement on cost issues, and the rates cannot be said to be TELRIC-compliant.

Staff indicated four matters of concern, to wit: 1) in some cases, sub-loop rates are higher than whole loop rates; 2) the NRCs for loop conditioning differ between loops and sub-loops, although the work involved appears identical; 3) the LFAM model SBC used to develop sub-loop and dark UNE is not TELRIC-compliant, as the Proposed Order in the *Alt Reg Review* proceeding determined;<sup>86</sup> and, 4) SBC’s rates compare unfavorably with the rates of its

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<sup>86</sup> See *Proposed Order* at 70-71, In the Matter of Illinois Bell Telephone Company: Application for Review of Alternative regulation plan; Illinois Bell Telephone Company: Petition to rebalance Illinois Bell Telephone Company’s Carrier Access and Network Access Line Rates; Citizens Utility Board and The People of the State of Illinois v. Illinois Bell Telephone Company: Verified Complaint for a Reduction in Illinois Bell Telephone Company’s Rates and Other Relief,

Michigan affiliate. Staff further considered SBC's "zone of reasonableness" analysis to be deficient, as certain Illinois rates that compare unfavorably to Michigan rates were omitted, and that rates were represented as a range, rather than in an enumerated list to be compared side-by-side.

Staff further stated that, while SBC's compliance tariff filing in the TELRIC II proceeding reduces the confusion surrounding its UNE combination rates, the Company did not yet have finalized rates for its UNE or UNE combination offerings.

AT&T stated that SBC's NRCs for new UNE-P combinations and EEL conversions are interim, having been arrived at through agreement at workshops, and have not been subjected to any investigation and analysis so as to determine whether they are TELRIC-compliant.

SBC responded that its recurring UNE-P rates are very low, and the NRCs for UNE-P are likewise lower than in other SBC states, and consist solely of ICC approved rate elements. Although there is no true up provision, it was asserted that the only party this adversely affects is actually SBC. Interim rates for the NGDLC UNE-P were based on a Staff proposal supported by AT&T, and neither Staff nor AT&T can argue that they are defective. In any case, SBC maintained, this rate is irrelevant to checklist compliance. The fact that certain dark fiber and sub-loop rates have not been approved is not, as the FCC has determined, a sufficient basis to deny Section 271 authority. Further, SBC reported, there has been no demand for these products. CNAM query rates have been on file for some time and, up to now, have been the subject of no complaints. Comparing these rates to New York rates clearly ignores demographic, regulatory and cost differences; while Illinois rates for this service are higher than Michigan rates, the Company argued that they are nonetheless comparable.

Staff and AT&T argued that the ICC should reject SBC's contention that its UNE rates are lower than those prevailing in other states. If SBC's rates are low, they asserted, it is because its costs are low. SBC's subloop rates compare unfavorably with those of its Michigan affiliate; 67% of SBC's rates are higher. Staff noted that the parties have been challenging SBC UNE rates in a number of proceedings such that their failure to challenge SBC dark fiber and sub-loop rates cannot be construed as approval, but more of a desire to devote time and resources to other rate cases. AT&T suggested that the lack of demand for these UNEs may result from their high rates and that the deployment of Project Pronto will eventually increase demand.

Regarding the NGDLC UNE-P, AT&T noted that the ICC set rates, based upon a state obligation to do so within 30 days, when cost based rates have not been established.<sup>87</sup> Accordingly, it argued, these rates cannot be deemed to fall

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ICC Docket Nos. 98-0252/0335; 00-0764 (consol.)(May 22, 2001). SBC subsequently withdrew the model.

<sup>87</sup> 220 ILCS 5/13-801(g) provides, in relevant part, that "[w]hen cost based rates have not been established, within 30 days after the filing of a petition for the setting of interim rates, or after the [ICC's] own motion, the [ICC] shall provide for interim rates that shall remain in full force and

within the “zone of reasonableness” on this account. With respect to NRCs for UNE-P and EEL conversions, AT&T disputed SBC’s contention that its NRCs are low and thus withstand ICC scrutiny, since SBC includes a charge that ought not to apply to UNE-P conversions and, thus, the lack of a “true-up” harms AT&T. Both AT&T and Staff argued that SBC’s application should be rejected until ICC-approved permanent NRCs are established. As regards line splitting, AT&T noted that SBC’s unwillingness to establish a separate line splitting rate contrasts unfavorably with the efforts of its Michigan affiliate, which has worked collaboratively with CLECs to do just that.

Staff further argued that line connection charges for UNE subloops and dark fiber mileage rates failed the test, and recommended that the line connection charges be reduced to \$20.21 and that the dark fiber mileage rates be reduced on an interim basis to the level of the Michigan rates. SBC maintained that these rates were proper, comparing favorably to rates in Texas and California, and that reduction of the line connection charge would prevent SBC from recovering its costs. SBC stated that Staff’s reliance on Michigan dark fiber mileage rates for the zone of reasonableness comparison was improper. SBC filed the required tariff changes to include interim rate true-ups. SBC, the CLECs and Staff agreed that the tariffed NRCs for new UNE-P combinations agreed to by the parties in the TELRIC II Order should not be subject to true-up and that this obligation should be eliminated from the Phase I Order.

Upon review of SBC’s Phase II showings, Staff indicated that SBC should insert proposed SBC’s proposed compliance language that clarifies the application of EEL carrier connection charge into the Company’s tariff. Staff also indicated that SBC should insert both the EEL and UNE-P rate application matrices into its CLEC Online Handbook. If SBC takes these steps during this proceeding, Staff recommends that the ICC consider this issue resolved.

Having reviewed the Company’s “zone of reasonableness” showing with respect to EEL and UNE-P combination rates, and based on the current ICC investigation of these rates, Staff indicated that the SBC’s current tariffed UNE-P and EEL combinations rates are within a zone of reasonableness, albeit at the upper end thereof.

The Phase I Order directed SBC to make a “zone of reasonableness” showing with respect to the following: NRCs for UNE-P and EELs; local switching; unbundled dark fiber; unbundled sub-loops; access to AIN and CNAM databases; broadband services; and unbundled loops and HFPL. With the exception of dark fiber mileage rates and line connection charges for sub-loops, Staff concluded that the other interim rates SBC addressed fall within a zone of reasonableness.

Staff proposed alternative rates for dark fiber mileage and line connection charges for sub-loops. Staff viewed Michigan rates as being most comparable to Illinois, and indicated that the Illinois dark fiber mileage rates and sub-loop

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effect until the cost based rate determination is made, or the interim rate is modified, by the [ICC].”

connection charges were higher than the Michigan rates. Staff was satisfied with SBC's representation regarding true-up provisions.

WorldCom contended that the CLECs should not be unfairly left to contend with interim rates after Section 271 approval. Cook County observed that SBC has not made an election at the FCC as to whether it will be adopting a particular pricing approach for reciprocal compensation, which may inhibit competition.

### **3. ICC Analysis and Conclusion**

At the outset, and in its Phase I Order, the ICC required SBC to demonstrate TELRIC compliance, or offer a "zone of reasonableness" showing, for its interim and not-yet-investigated rates, as well as its UNE combination charges. The ICC noted that the FCC has determined that interim rates are not fatal to a Section 271 application provided that such rates pass the "zone of reasonableness" test. SBC was therefore directed to show that its interim rates meet this test. The ICC, however, exempted from its holding those interim rates: 1) that are zero; 2) for access to AIN databases; 3) the "record work only" charge; 4) recurring COPTS port charges; and 5) Broadband UNE rates. The ICC found those rates to be *prima facie* reasonable.

Based upon the numerous UNE pricing dockets it has heard, the ICC found its commitment to TELRIC pricing principles to be well established. In the Phase I Order, the ICC also directed SBC to incorporate true-up language in its interim tariffs as of the effective date of that order. Given that the Company's NGDLC UNE-P rates are subject to true-up, CLEC arguments as to these rates were rejected. The ICC directed Staff to prepare a Report and Initiating Order to commence an investigation immediately with respect to dark fiber; subloops; and CNAM database query rates.

In short, the Phase I Order required SBC to provide a showing that certain interim UNE rates satisfied a "zone of reasonableness" analysis, to include true-up provisions as appropriate, and further indicated that the Company's compliance with the *TELRIC 2000 Order* would be assessed in Phase II.

Subsequently, SBC and Staff stipulated that SBC had complied with the *TELRIC 2000 Order*. Further, SBC provided zone of reasonableness analyses for dark fiber, unbundled subloops, CNAM queries, and UNE combination NRCs for new UNE-Ps, EELs and special access to UNE conversions based on currently effective rates in Texas, California and Michigan. SBC proposed to reduce the rates for UNE subloops and CNAM queries. In response to Staff, SBC proposed to reduce its line connection rates for UNE subloops to the level of California's rates if the ICC concluded that it was appropriate, and committed to file true-up language in the appropriate tariffs. In response to Staff concerns about rate clarity, SBC clarified its EEL tariff and added matrices to the CLEC Online Handbook to further explain the application of EEL and UNE-P charges, which Staff found acceptable.

The ICC was satisfied with the resolutions set out on the pricing issues by

SBC and Staff and found them reasonable. To this end, SBC was directed to file the rate changes it had proposed within 45 days of the entry of the Final Order in Docket No. 01-0662. Further, as regards the one outstanding dispute of line connection and dark fiber mileage rates, the ICC found that SBC had successfully demonstrated that the proposed or effective rates are reasonable in relation to those of one or more companies that might appropriately be compared to SBC Illinois.

Finally, the ICC noted that our Phase I Order required certain true-up language. In light of the showing on record indicating that SBC Illinois, the CLECs and Staff, all agreed that tariffed NRCs for new UNE-P combinations should not be subject to true-up, the ICC released the Company from this requirement.

All in all, the ICC found that the pricing element in Checklist Item 1 was satisfied.

## **E. OSS**

There are five primary OSS domains: pre-ordering, ordering, provisioning, maintenance and repair, and billing. In addition, a BOC must demonstrate that it is providing adequate assistance to competing carriers to understand how to implement and use all of the OSS functions and that it provides an adequate change management process. The provision of OSS must be nondiscriminatory.

Phase I of the ICC's investigative proceeding, examined OSS systems, while Phase II reviewed the testing of those systems.

### **1. SBC Illinois' Demonstration of Compliance**

#### Nondiscriminatory Access – OSS

In Phase I, SBC submitted affidavits in support of its compliance with the requirements related to nondiscriminatory access to OSS. SBC described the electronic and manual interfaces it offers for each OSS function, along with its efforts to address operational concerns and ensure operational readiness. SBC asserted in Phase 1 that it has developed sufficient electronic and manual interfaces to allow competing carriers equivalent access to all of the necessary OSS functions. CLECs themselves have already tested and are making commercial use of the interfaces and resources offered to them, as demonstrated, *inter alia*, by AT&T's market entry.

Pre-ordering, SBC informed, means those activities necessary to gather and verify the information necessary to place an order. SBC offers CLECs two electronic interfaces for pre-ordering: EDI/CORBA, which permits a CLEC's systems to interface with SBC's, and Enhanced Verigate, a GUI-type interface, which accepts commands from CLEC representatives working on computer

screens, just as well-known pc programs do, the latter being suitable for smaller CLECs. Both interfaces respond in “real time” and allow CLECs access to the same information and functions available to SBC’s retail representatives, and to the same functions identified by the FCC in prior orders under Section 271. The FCC considers whether a BOC allows CLECs to integrate pre-ordering information into the ordering process and into their own systems. The EDI/CORBA does this in a manner already found to be Section 271-compliant. SBC conceded that some difficulties existed with the GUI interface, but these have been largely corrected, and are not significant, as the EDI/CORBA interface serves the great majority of commercial traffic, and is the industry standard.

SBC offered two alternative interfaces to submit local service requests: an application-to-application interface based on EDI, which can be used either on a standalone basis or coupled with the EDI/CORBA pre-order interface, and Enhanced LEX, a GUI designed so that CLECs can access it using a commercial Internet Web browser program. Finally, some CLECs submit orders manually (e.g., by facsimile) through the local service center. SBC offers CLECs training and assistance in using these interfaces and processes, so that rejections will be reduced. The only criticism regarding order rejections was WorldCom’s claim that SBC improperly rejected orders to migrate a “line sharing” arrangement into a “line splitting” arrangement.

SBC issues electronic “jeopardy” notices to CLECs if a condition in scheduling might cause it to miss the due date for installation. SBC issues electronic notices of order completion (“service order completions” or “SOCs”) to the CLEC once physical work is complete and the order is registered as complete in its ordering and provisioning systems. WorldCom requested that SBC investigate certain “missing” SOC, a problem which SBC has investigated and, it contended, substantially resolved. CLECs may access SBC’s OSS electronically via interfaces that use standard formats. In some cases, CLEC orders and requests are electronically translated, and can be processed as is; these are said to “flow through”. If the order must be manually translated, it does not flow through. The FCC does not require 100% flow through, or even any specific showing. SBC uses the same systems for its retail customers as for wholesale. SBC has successfully implemented a system enhancement to permit CLECs to order pay-per-call blocking for their customers.

SBC alleged that it provides CLECs with nondiscriminatory access to repair and maintenance functions, which they may use to report trouble and request maintenance. SBC offers two methods to electronically report trouble: EBTA, an industry standard application-to-application method, and an EBTA GUI. CLECs may also contact a technician at SBC’s LOC, which is responsible for receiving maintenance trouble reports. The technician will then enter the trouble report into its electronic systems. Upon completing necessary repair work, a technician fills out a “ticket” with a “closure code” that indicates what the trouble was, what was done to resolve it, and how the trouble was resolved. If trouble is not found, or is caused by the customer or CLEC, a charge is assessed. SBC has implemented numerous institutional and quality controls to assure that this process is effective. SBC characterizes complaints about this

process raised by McLeod and TDS as isolated instances of incorrect coding, most of which resulted in SBC doing work free; as unsupported by evidence; or as misunderstandings. SBC has instituted a process whereby CLECs can request investigation of repair processes. As well as the two electronic trouble report interfaces mentioned, CLECs can use these methods to conduct an MLT, the same software product SBC's retail organization uses to test lines. WorldCom raised several complaints regarding this process, all of which should be discounted, according to SBC.

SBC informed that the two principal functions involved in billing are: 1) CLECs billing end users for telephone usage, and the information that SBC provides to assist in that billing; and 2) SBC billing CLECs for wholesale products and services. The FCC requires an ILEC to provide CLECs with complete, accurate reports on usage of CLEC customers in substantially the same time and manner that the ILEC provides such information to itself. SBC does so, providing information to CLECs in the same manner as to its retail arm, and in several different formats. SBC issues monthly wholesale bills to CLECs in a manner that gives them a meaningful opportunity to compete, as the FCC requires. According to SBC, it applies extensive quality control measures to this process.

SBC noted that three of the issues identified by the CLECs concern switch "translations": the programming within a switch that determines how to route and record a call. According to SBC, routing translations determine what kind of call is being switched, while line translations determine the appropriate carrier for the call. SBC identified three minor problems with translations, related to billing and trouble report systems. While these problems were not systemic, material or discriminatory, nor did they affect end users, SBC nonetheless studied and resolved them.

According to WorldCom, SBC had sent it daily usage files ("DUFs") for UNE-P end users showing local usage information for calls that should have been handled as intraLATA toll calls. This resulted from translation problems, SBC explained, and has since been resolved. WorldCom nonetheless asserted that it continues to be billed for intraLATA toll calls. This is a proper result, according to SBC, since switching and transport costs are properly chargeable under the circumstances. WorldCom contended that SBC has not converted UNE-P billing from the Reseller Billing System ("RBS") format to the Carrier Access Billing System ("CABS") format, as required by ICC Order<sup>88</sup> and that the "jurisdictional indicator" on CABS bills (which shows whether a call was local or local toll) is incorrect. SBC enhanced its systems to deal with the latter problem, and the former assertion concerns OS/DA calls, which CABS is not expected to bill. In any case, the bills sent by SBC were correct. WorldCom also asserted that

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<sup>88</sup> See *Order, 21st Century Telecom of Illinois, Inc., AT&T Communications of Illinois, Inc., CoreComm Illinois, Inc., Covad Communications Company, Illinois Bell Telephone Company, MCI WorldCom, Communications, Inc., McLeodUSA Telecommunications Services, Inc., NEXTLINK Illinois, Inc., NorthPoint Communications, Inc., Rhythms Links Inc., Sprint Communications Company L.P., and Ushman Communications Company: Joint Submission of the Amended Plan of Record for Operations Support Systems ("OSS"), ICC Docket No. 00-0592 (January 24, 2001) ("Plan of Record Order).*

it was overbilled for OS/DA calls, while SBC claimed the calls in question were not direct-dialed, and were billed correctly. In the course of determining this, SBC found minor, non-systemic OS/DA billing problems and corrected them.

SBC informed that it designates an account manager to work with each CLEC, and technical experts to assist with OSS interfacing. It offers training, expert assistance at service centers, and user forums to air problems. AT&T alleged excessive call times at one service center, but SBC responded that this was caused by a large volume of CLEC calls regarding new software, and was short-lived. SBC has instituted a "change management plan" ("CMP") to communicate to CLECs the methods and procedures that it employs regarding the performance of, and changes to, its OSS system. The FCC has determined that a CMP gives an efficient competitor a meaningful opportunity to compete if: (1) CLECs have input in the design and operation of the CMP; (2) the CMP is memorialized in a basic document; (3) there is a separate forum for CM disputes; and (4) there is a stable testing environment that mirrors production. SBC asserted that it satisfies the first three points, as its CMP was developed through negotiations with CLECs, memorialized, and approved by the ICC<sup>89</sup> and FCC. The CMP permits CLECs to vote on disputed changes. While AT&T disputed that a stable testing environment exists, SBC disputed this, and AT&T did not argue that it has been harmed by the defects it alleges. AT&T alleged that implementation of Local Service Ordering Guide version 4 ("LSOG 4") was done carelessly and without regard to the CMP. SBC stated it used the CMP and published a detailed implementation schedule, with opportunity for CLEC participation. AT&T could have put the matter to a vote in any case. AT&T's and McLeod's complaints about the implementation of LSOG 5 were irrelevant as SBC is using LSOG 4 to show compliance, and are insufficient in any case.

SBC indicated the availability of two pre-order interfaces: EDI/CORBA (an application-to-application interface) and Verigate (a graphical user interface). SBC opined that both of these interfaces "allow requesting carriers access to the same information and functions available to SBC's retail representatives, and to the same functions identified by the FCC in prior orders under section 271." According to SBC, its EDI/CORBA pre-order interface is designed to be integrated with its EDI order gateway "to form a seamless pre-order/order system."<sup>90</sup> SBC also offers CLECs two alternative ordering interfaces: its application-to-application EDI interface and its Enhanced LEX Graphical User Interface. These ordering systems notify CLECs of incorrectly formatted orders and, once properly formatted, provide the CLEC a notice confirming the receipt of its order. When the order is provisioned, a completion notice is also returned to the CLEC. SBC also offers CLECs the ability to check on the status of orders. Some order types are designed to flow-through, while manual processes are utilized for other order types. SBC's also intends to provide, through a tariff, a number of performance measures utilized to track the actual provisioning of orders including average installation intervals, percentage of installations timely completed, percentage completed by the due date, average delay for orders not

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<sup>89</sup> See *Plan of Record Order*

<sup>90</sup> *Order*, at ¶¶491-98, 902.

completed by the due date and rate of installation for which “trouble” is reported within 30 days of installation. SBC also offers two alternative methods by which a CLEC may report trouble and request maintenance: the so-called Electronic Bonding & Trouble Administration (EBTA) application-to-application interface and the EBTA GUI interface. According to SBC these interfaces permit a CLEC to issue trouble reports, conduct a mechanized loop test, determine the status of a previous trouble report, view a list of open trouble reports, and view a list of reports closed within the last 120 days. In regard to billing, SBC offers daily usage files to CLECs for use in billing their end-user customers and other carriers. In addition, it issues monthly bills to carriers. All of these billing functions are subject to certain performance measures. SBC also discussed its account management and training procedures, the availability of technical assistance, and its change management plan.<sup>91</sup>

## **2. Parties’ Positions, Arguments and Evidence**

### **(a) Pre-Ordering**

SBC Illinois’ suggested to AT&T that in lieu of relying on BCNs, AT&T should institute a query process in AT&T’s systems, i.e., that it do a post-migration query of the CSR to determine whether posting has been completed. AT&T Exh. 3.1, ¶ 15. But according to AT&T, the CSR query process proposed by SBC Illinois is not a suitable substitute for BCNs. *Id.* First of all, the CSR query is a GUI-based functionality in SBC’s *pre-ordering* interfaces. It is not a practical *order* tracking tool for CLECs like AT&T, which submit large order volumes. To use this function the CLEC would be required to expend significant manual efforts to match information in the GUI to the status of orders in AT&T’s own order management system. If (as occurred in January 2003) AT&T failed to receive tens of thousands of BCNs, it would be extremely expensive and time-consuming for AT&T to use CSR queries to determine the status of each such order. A CLEC using LSOG 5 should not be required to expend additional time and resources to obtain the same information that SBC agreed to provide through BCNs in LSOG 5. *Id.* (01-0662 Order at 335.)

According to SBC Illinois, AT&T claimed the GUI was slow and unstable when first deployed in March 2001 (AT&T Ex. 4.0 at 4-7). Those issues were resolved and SBC implemented additional corrective measures after the April 2002 OSS release (Tr. 1257-58) (Am. Ill. Ex. 4.1 at 39-40). (01-0662 Order at 104.)

At WorldCom’s request, SBC modified EDI/CORBA to provide address information in a “parsed” format (divided into individual data fields) that corresponds to the order form. (*Id.* ¶¶ 98-99.) SBC also has modified its pre-ordering and ordering systems and formats to synchronize fields common to both

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<sup>91</sup> Order, at ¶¶ 495-503.

interfaces. (*Id.* ¶ 101.) These features go above and beyond the systems the FCC found compliant in Texas. Texas 271 Order, ¶ 154. (01-0662 Order at 104.)

## **ICC Analysis and Conclusion**

The pre-ordering function includes those activities that a carrier undertakes to gather and verify the information necessary to place an order. With respect to this function, the complaints set out by AT&T and WorldCom are minor and credibly explained away by the Company. Both the BearingPoint results and the performance analysis review, support our view that there are no deficiencies with respect to the pre-ordering function. Stated another way, the record as a whole shows SBC Illinois to provide nondiscriminatory access to the pre-order functions.

### **(b) Ordering**

#### **(i) Line Loss Notification**

Line Loss Notifications (“LLN”) inform a CLEC when a customer has left that CLEC and migrated to another carrier. This notice essentially tells the CLEC to stop billing that customer. SBC’s systems should provide an LLN to the losing carrier after the winning carrier’s order to migrate the end user is processed. Unless a LLN is sent, the losing carrier will likely keep on billing the end user and thus, suffer damage to its reputation.

Staff and various CLECs contended that SBC does not send timely LLNs, and that this failure is systemic rather than isolated, and remains unresolved. In the Phase I investigative proceeding, Staff recommended that certain remedial measures be implemented by the Company.

SBC conceded that LLN problems exist, but further contended that it investigated those problems, implemented corrective actions, and continues to monitor the situation. It also indicated that Section 271 does not require perfect LLN performance.

SBC explained that it has taken a number of corrective actions to fix LLN problems, such as formal training programs, reconciling accounts, meeting with CLECs to discuss line loss issues, modifying its retail operations so it relies exclusively on the same LLNs sent to CLECs, and maintaining the cross-functional team at least until June 30, 2003. In addition, SBC stated that it has satisfied TVV 4-29, and 4-28, and agreed to modify MI 13 pursuant to Staff’s recommendations, including accounting for winback activity.

SBC further demonstrated that its percentage of successful LLN’s has increased from 92.9% to 97.7% between September 2002 and January 2003. Additionally, SBC stated that the problems identified by the other parties do not demonstrate that there are systemic problems with the LLN, since the problems it experienced were unique circumstances with little likelihood of recurrence, and

either affected one CLEC or a small volume of LLNs.<sup>92</sup>

WorldCom stated that CLECs continued to experience problems as recent as Spring 2003. Due to a change SBC implemented in January 2003, WorldCom alleged, it did not receive 5,000 LLNs. On March 6, 2003 SBC sent a message from its SBC Midwest Region offices to CLECs informing them that LLN's were sent on lines that CLECs did not lose, affecting less than 3,000 transactions over a period of several months.

AT&T detailed the problems it has experienced with SBC's LLN's, stating that it received approximately 10,000 LLN errors in the last five months of 2002. Having noted that SBC has been attempting to correct its LLN since mid-2001, AT&T argued that the continual re-occurrence of problems shows that SBC has not developed an OSS that reliably provides complete and timely LLNs. In response to SBC's rebuttal that it has implemented corrections to its systems, AT&T pointed out that since that time AT&T has experienced "repeated and recurring problems with LLN in the period since October 2002."<sup>93</sup> Furthermore, AT&T stated that SBC sent via fax, instead of through the GUI Interface, 1,700 erroneous LLNs to AT&T between October 10, 2002 and February 10, 2003.

Z-Tel relied upon the March 6, 2003 Accessible Letter sent by SBC, acknowledging its line loss shortcomings in the five state region, as proof that the problem has not been fixed. Z-Tel requested that the ICC require SBC to demonstrate six consecutive months of satisfactory line loss performance prior to finding compliance with its obligation to provide nondiscriminatory access to OSS.

Staff indicated that SBC had complied with the majority of the recommendations set out in the Phase I Order. Staff, however, was not convinced that further LLN operational problems would not occur, given the nature of the problems that have been seen to date. Despite the introduction of a "cross-functional team" to address the matter, SBC's LLN problems had recurred, and were not identified by the Company until the matter was raised by a CLEC. Also, Staff noted, the measures used to assess SBC's performance fail to capture situations where SBC completely fails to send an LLN, or situations where SBC wins a customer back from a CLEC. Thus, the ICC cannot properly monitor SBC's LLN performance. Staff recommended, in part, that the ICC order SBC to keep its cross-functional team in place.

### **ICC Analysis and Conclusion – Line Loss Notification**

The ICC considered the LLN issue to be significant, and the resolution of the problem as vital to the development of a competitive market. At the outset, and in its Phase I order, the ICC observed that SBC's work to address the LLN problem was ongoing, and that the final review of LLN performance was not yet at hand. At that stage, the ICC took the initiative of requiring certain remedial actions be taken by the Company so as to: a) emphasize the importance the

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<sup>92</sup> Order, at ¶¶912-26.

<sup>93</sup> Order, at ¶1268.

ICC gave to this matter; and b) have SBC Illinois work on and resolve the situation at the earliest opportunity. In order to meaningfully address this issue, the ICC accepted Staff's concrete and detailed improvement recommendations. SBC Illinois agreed to implement each of these improvements, expended a good amount of resources and, in most cases, had completed the implementation of these measures at the time of the Phase II proceeding. This resulted in improved performance, as demonstrated both in the positive BearingPoint test results, and in the marked reduction of line loss notification problems. The Commission acknowledged in Phase II that SBC had complied with most of these recommendations.

The ICC noted that SBC Illinois had committed to an improvement program which should result in continued overall improvements to this process and the ICC made clear that, unless otherwise directed, the Company was to provide bi-monthly updates to the ICC outlining its activity and its progress in implementing the Line Loss Plan of record as finalized by the Michigan Commission. The ICC directed its Staff to monitor and keep it informed of the situation.

In the end, the ICC found that the implementation of Staff's proposals for additional line loss activities to be both necessary and appropriate, and required the Company to present its full and unwavering commitment to implement each of the following:

- 1) SBC Illinois will make line loss performance measure MI 13, a remedied performance measure. If tiers are applicable to the performance remedy plan then the measure will have a medium weight for both tier 1 and tier 2 payments or comparable remedy level;
- 2) SBC Illinois will implement all changes to performance measures MI 13 and MI 13.1 agreed upon in the last performance measurement six month review session including the clarification that all line loss notices generated due to SBC Illinois winback scenarios are included in the MI 13 and MI 13.1 performance measurements;
- 3) SBC Illinois shall file revised tariff pages with the Commission for the changes it will make to performance measure MI 13 and MI 13.1 based upon this Order and the Company's commitments in this order, such that the effective date of the tariff will coincide with the implementation date of the performance measurement changes;

- 4) SBC Illinois shall closely monitor the line loss notifications it provides to CLECs until such time as SBC Illinois provides a full six months of line loss notifications without any new problems being uncovered and without any of the existing or prior problems having resurfaced.

These were concrete commitments over which the ICC will maintain keen oversight. The Line Loss Plan in conjunction with the implementation of each of Staff's proposals (and corresponding Company commitments) was sufficient grounds for the ICC to find that SBC Illinois' line loss notification procedures comply with section 271 requirements.

#### (ii) Order Completion Notices

WorldCom, Forte, AT&T and Staff raised issues regarding SBC's failure to provide accurate and timely completion notices.<sup>94</sup> Besides sending erroneous completion notices on some orders, WorldCom demonstrated that SBC failed to process disconnect orders, had repeatedly cancelled some of WorldCom's orders without notification, and failed to send reject notices on some of the orders WorldCom properly cancelled.<sup>95</sup> Forte stated that its customers routinely receive incorrectly formatted telephone numbers. This operation, measured by BearingPoint in Observation 700, was passed in February 2003. Forte claimed to have experienced this problem in 4.9% of its orders that have been completed since BearingPoint found SBC to pass Observation 700.

In year 2002, SBC explained, it handled over 22 million transactions such that the CLEC issues are not material in light of this volume of commercial usage. In response to WorldCom's contentions that SBC's Service Order Completion ("SOC") notices are routinely missing, SBC stated that none of WorldCom's documentation indicated that it routinely failed to provide WorldCom with cancellations or any other notifications. In response to Forte's complaint, of erroneous completion notices regarding the provision of dialtone, SBC stated that the rate of installation trouble reports Forte experienced for installations from November, 2002 through January, 2003, actually showed that Forte received better service than what SBC provided its own retail operations.

Responding to WorldCom's complaint, that SBC's transmission of completion notices caused its customers to be double-billed, SBC submitted data showing that the error rate was 0.005% for all CLECs from September through January. Further, the Company observed, SBC Midwest had implemented a process that will identify purchase order numbers so that the CLEC can be notified about the cause of the error. In response to WorldCom's assertion that the erroneous SOC's were not measured, SBC stated that assuming that all of the missing SOC's were counted as misses for purposes of PM 7.1, the impact would be statistically insignificant. As to AT&T's complaint that SBC failed to

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<sup>94</sup> Order, at ¶¶1093-96(WorldCom), 1054-56 (Forte), 1272-79 (AT&T), 1118-22 (Staff).

<sup>95</sup> Order, at ¶¶1101-09.

send Post to Bill (“PTB”) notices to CLECs submitting orders via LSOG 5.0, SBC stated that it identified the root cause of the problem in January 2003 and had established a method of access for CLECs that is convenient, and based on a well-established process. With regard to Forte’s complaint regarding Observation 700 (invalidly-formatted telephone numbers) SBC stated that this Observation was closed on March 4, 2003.<sup>96</sup>

### **ICC Analysis and Conclusion – Order Completion Notices**

With respect to the complaints related to ordering that were raised by the parties in these premises, the ICC found that the Company had taken prompt and aggressive actions to identify the cause and to fix them with minimal impact to the CLEC. The ICC expressed its expectations that such activity by SBC would continue. In short, none of the issues considered demonstrated the Company’s OSS to be inaccurate or unreliable.

#### **(iii) Single Order Process**

SBC Illinois explained that it offers a process whereby a CLEC can convert certain existing special access arrangements to an EEL or to a UNE loop. The latter process, it noted, requires two orders: (a) an Access Service Request to disconnect the special access circuit, coupled with (b) a Local Service Request to order the loop.

XO complained that SBC-Illinois’ requires this two-order process for the presumably less complicated special access to UNE conversion orders as compared to its process for special access to EEL conversions. XO maintained that this led to increased confusion and inefficiency. (XO Ex.1.0 at 5, 6). In addition, XO argued, this increased the likelihood of failed orders, given the fact that if either the LSR or ASR gets rejected, the other form will also be rejected (after an approximate two-hour wait period). XO wanted to have the ICC “require Ameritech to consolidate into one order its current two-order process for converting special access to UNEs.” (XO Reply Brief at 7).

According to SBC-Illinois, XO did not in any way establish that the use of a two-order process is, under the circumstances, unreasonable, discriminatory, or otherwise hindering competition in any significant way. Relevant to these matters, the Company maintained, XO is only seen to claim that there may be an “increased likelihood” of failed orders because two orders, instead of one, must flow through without rejection. (XO Br. on Exceptions at 4-5). Aside from this assertion, SBC-Illinois argued, there is no evidence to indicate that this “increased likelihood” has translated into any real-world impact.

Further, SBC-Illinois pointed out that the FCC has repeatedly rejected that position and upheld the use of multiple order processes, even though *all*

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<sup>96</sup> Order, at ¶¶945-952.

multiple order processes, as a matter of logic, would entail the increased likelihood of fallout that XO here alleges. See, e.g., Texas 271 Order, ¶¶ 198-200 (approving the use of a three-order process for UNE-P orders); New Jersey 271 Order, ¶ 135 (approving the use of a two-order process for line splitting). Most importantly, the Company observes, the FCC has specifically upheld the use of a two-order process in the precise context presented here: for special access to UNE conversions that, exactly like SBC Illinois' process, requires the submission of an ASR and an LSR. Kansas & Oklahoma 271 Order, ¶ 176.

### **ICC Analysis and Conclusion – Single Order Process**

The ICC determined that there was no evidence in this proceeding to establish that the two-order process at issue has competitively significant impacts or is mandated by law. In the end, the ICC did not grant XO's request.

#### **(c) Provisioning**

##### **(i) WSC forms**

SBC asserted that it had satisfied twenty-three of twenty-four evaluation criteria for provisioning. In response to WorldCom's assertions that the performance measures are inaccurate, SBC indicated that "to the extent WorldCom wants to modify the agreed business rule, its request should go to the normal collaborative process for such changes." Further, SBC stated that WorldCom's accuracy argument relies on a measure that is not related to provisioning, but related to customer service records.<sup>97</sup>

In submitting orders for new lines in Illinois, WorldCom stated that SBC requires a CLEC to complete a "working service conflict" form ("WSC"), to determine whether the order should be provisioned using the existing line or an entirely new line. WorldCom alleged that SBC manually processes the WSC via facsimile, and this resulted in processing errors. WorldCom indicated that at the CLEC User Forum, a few CLECs disagreed with the manual processing of WSC proposed by SBC, but that it went ahead with its proposal.

Forte documented that ninety percent of the WSC faxes it received in February 2003 were either for the wrong company, arrived after the due date, or arrived on the due date. Forte acknowledged that SBC has proposed a corrective action, and will monitor the results and report its findings at the next CLEC User Forum.

In the TVV4-27 provisioning test, BearingPoint evaluated the accuracy of Customer Service Records ("CSRs"), and determined that SBC's post-order CSRs did not accurately reflect what was ordered on the pre-order CSRs.<sup>98</sup> BearingPoint produced Exception Report 128 on June 20, 2002, which confirms that SBC failed to update Test CLEC CSRs. SBC initiated a corrective action, and BearingPoint retested the evaluation criterion from August through October

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<sup>97</sup> Id. at ¶¶ 961-963.

<sup>98</sup> BearingPoint, OSS Evaluation Project Report: OSS Report, at 708 (December 20, 2002).

2002 and determined that SBC's performance was still below the 95% benchmark.

### **ICC Analysis and Conclusion – WSC Forms**

Both SBC's commercial performance results, and the results of the OSS test, demonstrate that it provides nondiscriminatory provisioning. In the ICC's overall view, the few issues raised were minor and not material to overall compliance.

#### **(d) Maintenance and Repair**

##### **(i) The Special and UNE Circuit Repair Coding Accuracy Plan**

McLeodUSA and TDS Metrocom noted that SBC Illinois had submitted in this case, the Compliance Plan for Special and UNE Circuit Repair Coding Accuracy ("Repair Coding Accuracy Plan") that SBC Michigan had submitted in MPSC Case No. U-12320. These CLECs stated that the SBC Repair Coding Accuracy Plan is intended to address (among other things) some of the problems that McLeodUSA and TDS Metrocom have encountered with inaccurate coding of trouble tickets by SBC field technicians who are dispatched in response to trouble reports from CLECs or their customers.

McLeodUSA and TDS Metrocom recommended that the Commission require certain modifications to SBC's Repair Coding Accuracy Plan to wit: (1) for each of the next three years, SBC should annually provide the technician training sessions described at page 7 of the Repair Coding Accuracy Plan; (2) for the next three years, SBC should be required to continue the management review and oversight activities described at pages 7-8 of the Repair Coding Accuracy Plan; (3) SBC should also be required to make a commitment to provide additional training that emphasizes correct coding of CLEC trouble tickets as a permanent part of the employee training for new repair technicians. McLeodUSA and TDS Metrocom asserted that these proposals are meant to insure that SBC will properly train and supervise the employees who repair UNE loops serving CLEC customers well into the future.

SBC Illinois indicated its willingness to incorporate CLEC items (2) and (3) into its Repair Coding Accuracy Plan, but had reservations as to the first of the proposals.

### **ICC Analysis and Conclusion – Repair Coding Accuracy Plan**

The latter two of the three recommendations by the CLECs on this issue appeared to be wholly reasonable to the ICC. The ICC further instructed SBC Illinois to incorporate item (1), with one important modification. Rather than provide annual training to all of the affected technicians for each of the next three years, as these CLECs propose under item (1), the ICC agreed that SBC Illinois

should modify its plan so that its technicians are fully trained on the appropriate repair coding procedures at least once.

If additional training or update sessions are needed, the ICC noted its expectations that the Company will provide such additional training in conjunction with the on-going management reviews and oversight activities set out under item (2), above. According to the Company, the Michigan Commission also required just one-time training for the SBC technician such that the ICC's adoption of the same requirement will allow SBC Midwest to have a single region-wide repair coding training program for its technicians. Whereas the ICC acts on its own initiative in most cases, it saw a real benefit, i.e., lack of confusion and ease of administration, to arise in the development of a single plan for this area.

The ICC further determined that the Repair Coding Accuracy Plan in Illinois should apply only to special circuits and not to UNEs. Given that the Company successfully passed the BearingPoint evaluation of repair coding as it applies to UNEs there was no Illinois-specific need to have a repair coding accuracy plan for UNEs in this state.

In the ICC's review, SBC Illinois' commercial performance results and the results of the OSS test demonstrated that the Company provides nondiscriminatory access to repair and maintenance functions. The few issues raised in this area were minor, according to the ICC, and do not affect overall compliance

**(e) Billing**

**(i) UNE-P Billing**

To demonstrate that its billing system is accurate, SBC relied upon the BearingPoint test, which found that all six test categories exceeded the 95% benchmark. In response to the complaints by Forte, WorldCom, McLeodUSA and AT&T, SBC stated that the billing issues identified by the CLECs involved either a limited number of products, isolated circumstances or one-time system changes, that do not demonstrate any systemic problems; that the billing problems identified by the CLECs resulted from human error, and not from system defects. Further, SBC explained that given how complex its Carrier Access Billing System ("CABS") is, and the enormity of the volume of bills generated and rate table that are updated, there occasionally will be some billing discrepancies.

In responding to the UNE-P billing problems identified by the CLECs, SBC stated that there were several sources of those problems. To correct these problems, SBC proposed to implement process and procedure improvements to keep CLEC contracts up-to-date and to better document and administer CLEC decisions to order out of contract or tariff, where such an option is available. In addition, SBC proposed to file reports every other month detailing the steps

taken by both SBC and the CLECs to clarify these billing issues. SBC would stop producing these reports once it has implemented the process improvements.

WorldCom stated that the Carrier Access Billing System (“CABS”) generates the monthly wholesale bills and contains widespread inaccuracies. Many of the USOCs and associated rates that routinely occur on the UNE-P CABS bills do not comport with the existing tariff. WorldCom indicated that this had been occurring since August 2002. In addition to inaccurate charges, SBC is also “reconciling” charges, or crediting WorldCom with the concern being that the statement is unclear as to what SBC is actually reconciling. Relative to SBC’s response to that WorldCom may not be purchasing from the tariff; WorldCom asserted that it is purchasing from the tariff.

AT&T also claimed to have experienced ongoing problems with the accuracy of SBC’s wholesale billing, usage data and rate application. AT&T detailed how SBC overcharges its Daily Usage Files, monthly recurring port rates, and non-recurring charges applicable to UNE-Platform combinations, or SBC bills AT&T for features that it does not provide, or causes AT&T to double bill customers due to SBC’s LLN problems.

McLeodUSA/TDS Metrocom stated that SBC’s wholesale billing systems and processes have not produced accurate and reliable wholesale bills. TDS Metrocom stated that since it began operations in 1998, it has never received an accurate bill from SBC, and that SBC had not disputed this fact. McLeodUSA explained that it had experienced similar wholesale billing problems. McLeodUSA and TDS Metrocom also stated that SBC’s performance measures relating to billing are not capturing information about such wholesale billing problems as application of incorrect rates, double billing, miscoding and back billing.

Z-Tel contended that SBC’s wholesale bills are inaccurate, and that insufficient information is provided to CLECs for them to perform reasonable bill audits. Z-Tel states that the billing auditability issue, as required to satisfy the Section 271 competitive checklist, boils down to two types of necessary improvements: (i) system changes and (ii) dispute resolution. Regarding system changes, Z-Tel submitted that SBC needs to provide references to the underlying controlling document and other references so that a CLEC can audit the bill it receives from SBC. Z-Tel also proposed tight deadlines be set for SBC to respond to billing disputes -- SBC should be required to respond within 30 days, and formal dispute resolution processes should be completed within 60 days.

According to Staff, the complexity of the billing systems, the large volume of commercial billing activities, and the 220,000 rate table updates demonstrated the importance of accurate rate updates. In Staff’s view, SBC must be able to effectively manage these manual rate table updates. Staff noted that the CLECs comments appear to contradict SBC’s statements that rates are correctly recorded on CLEC bills. Staff recommended that there be more discussion on the issue.

Also, Staff noted that the BearingPoint review had limited coverage to the

array of billing functions SBC Illinois provides.<sup>99</sup> As such, Staff maintained that, the Company was incorrect in stating that BearingPoint had confirmed its wholesale bills as clear and auditable. SBC's position, according to Staff, was based upon the fact that BearingPoint said the bills conform to the detail and format of the BOS or industry specifications. The two propositions, Staff noted, are different from one another.

### **ICC Analysis and Conclusion – UNEP Billing**

With respect to billing accuracy, one major issue related to UNE-P billing and involves rate changes ordered by the ICC in Docket Nos. 00-0700 and 98-0396. SBC conceded that it made some errors, but explains that they were limited in scope, and resulted to a large degree from confusion over whether CLECs were taking service under contract or tariff. The ICC accepted these explanations, but pressed forward.

The ICC determined that any billing errors associated with the UNE-P must be corrected, and observed that SBC had already committed to do so by changing billing tables where appropriate and handling the credit process on a CLEC-by-CLEC basis. SBC's actions in this regard were deemed to be appropriate, and the ICC directed the Company to report back to it when the current billing situation had been rectified; both with respect to updating CLEC billing tables to ensure that charges are correct on a going forward basis, and to its issuance of credits for past errors.

The evidence presented on record indicated that the UNE-P related billing errors resulted from human error and did not reflect any systemic problems inherent in SBC's billing systems. Given this showing, the ICC nevertheless instructed SBC to improve the "contract management processes" associated with updating rate tables in interconnection agreements, so as to cover the situations where the ICC orders a change to SBC's UNE rates.

The ICC did agree with SBC that CLECs should not assume that any ICC-ordered rate changes automatically flow through to the rates in an interconnection agreement. To be sure, we noted, the effect of an ICC order is near certain to impact each CLEC differently, depending on the specific terms of each individual agreement. Based on the circumstances indicated on record, CLECs would need to be more diligent in reviewing their interconnection agreements to determine whether further action is required, or permitted, to update UNE rates in their contracts.

To improve its "contract management process" on a going forward basis and relative to these billing issues SBC had proposed a "Five Step" program. The ICC's review indicated that this plan was appropriate and would have the effect of substantially reducing the potential for errors on a going forward basis.

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<sup>99</sup> Order, at ¶1147; see also ICC Docket No. 01-0662 Tr. at 2355-2356. "BearingPoint reviewed the aspects of SBC billing processes as specified in the master test plan with the exception of the following: the timeliness of daily usage file (DUF) records return process, the timeliness of the DUF returned status mechanism, the prioritization of calls for billing support, the completeness and accuracy of debit and credit adjustments, the completeness and accuracy of late charges."

As such, the ICC strongly encouraged CLECs with older agreements (particularly ones from the 1997-98 time frame) to take advantage of the process outlined by SBC, and to update their agreements and eliminate gaps that have contributed to these billing issues. SBC offered to file reports on a bi-monthly basis, which the ICC found to be important and it directed the Company to outline the progress made to implement these process improvements accordingly.<sup>100</sup>

## **(ii) The Billing Auditability and Dispute Resolution Plan**

In responding to WorldCom's assertions that the wholesale bills cannot be effectively audited, SBC stated that its wholesale bills are provided in an industry standard format, and is also used in six of the SBC states in which the FCC has granted section 271 approval. Further, SBC indicated that CLECs can avail themselves of training, documentation and technical support from third party companies that would be of benefit to them. In addition, SBC stated that line items on its wholesale bills do identify the USOC and provide a short description of the product that was ordered. SBC also pointed out that it provides account teams to answer specific billing questions, provides training classes for CLECs, and hosts weekly or monthly meetings with CLECs to discuss billing questions. Finally, SBC committed to implementing an Improvement Plan for Billing Auditability (that SBC had first proposed to the Michigan Public Service Commission in February 2003), and indicated that it would provide the ICC these Michigan Progress Reports.

Noting that SBC had filed in Docket No. 01-0662 a Bill Auditability and Dispute Resolution Plan ("Plan") that SBC Michigan had submitted in the Michigan Public Service Commission's case (MPSC Case No. U-12320), McLeodUSA/TDS Metrocom had argued that the Plan would be a wholly inadequate response to SBC's wholesale billing problems, because it only involves actions that are taken after SBC sends an inaccurate bill, and would not address the accuracy of the bills themselves. McLeodUSA/TDS Metrocom stated that the wholesale billing rehabilitation plan should include specific corrective action items and target completion dates, should provide for third party review and testing of successful completion and implementation of the corrective actions, should address, among other things, the adequacy of billing-related performance measures to realistically measure and depict SBC's billing performance, and should include a collaborative process to attempt to develop more meaningful billing-related performance measures. Finally, McLeodUSA/TDS Metrocom recommended that the ICC consider holding further evidentiary hearings, prior to issuing a Phase II order, in order to address the severity and specifics of SBC's wholesale billing issues, and to develop the details of the wholesale billing rehabilitation plan that SBC should be required to establish and implement as a condition of receiving a positive recommendation

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<sup>100</sup> See Order, at ¶¶1345-1349.

from this Commission on its Section 271 application to the FCC.

According to AT&T, auditability can be demonstrated by being able to process the wholesale bill into a system that verifies the charges on the bills versus orders placed (new and change charges) against existing customer records (recurring charges) and against payments and adjustments from previous bills. Because BearingPoint did none of these, and there is no record by SBC that its bills are auditable, AT&T claimed that the ICC has no assurance that the auditability aspect of billing had been resolved.

### **ICC Analysis and Conclusion – Auditability and Dispute Resolution Plan**

Turning its attention to billing auditability, the ICC was persuaded that SBC's bill formats are consistent with industry standards and that adequate resources are available to assist CLECs in understanding their bills. To this end, the Commission further relied on BearingPoint's test results that did not find any material problems with bill auditability.

With that, and on the whole of the record, the ICC observed that the Bill Auditability and Dispute Resolution Plan, being implemented in Michigan, was likely to benefit Illinois CLECs. The ICC accepted SBC's commitment to implement the same improvements in Illinois as it proposed for Michigan, and also directed SBC to file the same progress reports in Illinois that are to be filed in Michigan. The ICC went further in light of the CLEC's arguments. It specified that, once the Plan has been fully implemented, and to the extent that any CLEC in Illinois did not participate in the Michigan collaboratives on the Plan, or is further interested, either the CLEC and/or Staff, may request a Commission review and consideration of any proposals to expand either the scope or detail of the Plan.

The seriousness with which the ICC viewed and will treat billing concerns and issues on an on-going basis is well reflected in its directives. As such, the ICC considered not only the problems set out on record but also, and perhaps more importantly, the ways by which to meaningfully resolve any deficiencies. The ICC indicated that it would remain mindful at all times of the need to maintain jurisdiction and authority over the activity both to which the Company itself committed and over those actions that the ICC sought fit to direct.

On the whole and with these additional road maps for demonstrating compliance, together with the reporting and oversight, the ICC determined that SBC is satisfying any and all billing deficiencies so as to render it compliant with all of its OSS obligations.

#### **(f) Change Management Process**

SBC explained that the Change Management Process (CMP) refers to the methods and procedures that the BOC employs to communicate with competing carriers regarding the performance of, and changes to, the BOC's OSS system. SBC asserted that its CMP is the same process approved by the FCC in

California, and Arkansas/Missouri, and that BearingPoint found that 98% of SBC Midwest's actions met the test criteria. In response to AT&T's complaint, SBC stated that it had recently adopted an improvement plan. Further, SBC Midwest committed to filing quarterly reports regarding its progress with its improvement plan with the Commission until April 30, 2004.

BearingPoint subjected SBC's CMP to testing but, AT&T argued, not to the standard that the FCC had established and affirmed in recent orders. Additionally, SBC does not operate the plan according to the documented practice and procedures, but has eliminated the collaborative nature of the plan, side-stepped the established dispute resolution procedure, and the process SBC actually employs is *not* fully documented on the website, or anywhere else. Moreover, AT&T pointed out that SBC appears to have adopted another step in processing CLEC change requests, i.e., submitting requests to a "review board" composed of unspecified SBC personnel who have the final say on the priority SBC assigns to a change request even as the existence of an LSR Review Board and what role it would play was never agreed upon or negotiated with the CLECs.

### **ICC Analysis and Conclusion – Change Management Process**

On the whole of the record, the ICC found that the Company meets its obligations under the CMP. The ICC was persuaded by the fact that the FCC has granted 271 authority to SBC affiliates in California, Missouri and Arkansas, all of which use the same CMP as SBC in Illinois. Another convincing factor, and material to the analysis, was the BearingPoint Test Report, which found that the Company satisfied all seven criteria specifically related to CMP.

To be sure, AT&T pointed to several instances where the Company might have invoked its CMP. But, the ICC agreed with SBC's explanation that all but one of these instances, did not rise to the level of a change to the interface which would have required the use of the CMP process.

Significant too, in the ICC's conclusion, was that SBC had agreed to implement a "CMP Improvement Plan" in Illinois which should improve the overall management of the CMP and which appeared satisfactory to the CLECs concerns. Further, SBC Midwest committed to the filing of quarterly progress reports with the ICC for one year starting on April 30, 2003. The ICC set out its intent to hold SBC to that very commitment.

### **(g) The TVV and PPR Evaluation Criteria**

Staff recommended that SBC be required to address five deficiencies (TVV1-28, TVV4-27, TVV7-14, TVV1-4, and PPR13-4).<sup>101</sup> These were

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<sup>101</sup> Staff witness Weber points out, that since her initial affidavit was filed on February 21, 2003, BearingPoint has determined that the company now satisfies test evaluation criteria TVV1-

evaluation criteria for which SBC received a Not Satisfied result in the Operational Report from BearingPoint. Staff proposed that SBC be required to have an independent third party evaluate the Company's compliance and certify that the evaluation criteria previously found to be Not Satisfied are now, in fact, Satisfied<sup>102</sup>. Staff recommended that, if the ICC finds SBC's application to merit endorsement before the FCC, the Company should be required to make appropriate commitments with firm deadlines and face consequences if those commitments cannot be met. Staff believed that these items should be completed no later than November 2003.

With respect to the TVV1-28, TVV4-27 and TVV7-14, SBC agreed that they should be re-tested and verified by an independent third party. SBC stated, however, that it has only limited control over testing activities and their completion dates, and therefore cannot guarantee a final completion date of November 2003 as requested by Staff. With respect to TVV1-4 and PPR13-4, SBC indicated that the testing continues such that it expects testing to be successfully completed by late April 2003.

### **ICC Analysis and Conclusion – TVV and PPR Evaluation Criteria**

The ICC agreed with Staff and required SBC Illinois to address TVV 1-28, TVV 4-27, TVV 7-14 by July 2003, with verification by an independent third party auditor by November 2003. On June 16, 2003, SBC Illinois filed status reports on TVV 4-27 (CSI Accuracy) and TVV 7-14 (Special Circuit Repair Coding), and on July 15, 2003, it filed the first status report on TVV 1- 28 (Service Order Completion Timeliness), noting that the completion of the commitment is on schedule. The ICC also agreed that TVV1-4 and PPR13-4 need be improved so they pass their respective standards, and be verified by an independent third part auditor by August 2003. In its May 2003 monthly report, Bearing Point noted that testing of TVV 1-4 and PPR 13-4 has completed successfully.

### **(h) Key Performance Measures**

There are approximately 67 PMs that measure Checklist Item #2 UNE's. Of those, Staff claims that SBC passes all but 8 PMs -- 7.1, 10.1, 10.2, 10.3, 13, 17, MI-2, and MI-14.

PM 7.1 measures the percent of mechanized completion notices returned within one day. On average, over the three months of PM data, SBC issued service-order-completion notices on time 96.7% of the time; the standard is 99%.

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26, therefore, she makes clear that her recommendations apply to the remaining five Not Satisfied evaluation criteria.

<sup>102</sup> In its January 14, 2003 directive, the Commission stated that BearingPoint should conduct the verification activities once SBC addressed the deficiencies noted in the Operational Report. Staff Ex. 32.0, Schedule 32.03.

SBC argued that its performance does not affect overall compliance with the checklist item.

PMs 10.1, 10.2 & 10.3 – PMs 10.1, 10.2 and 10.3 measure the percent of reject messages returned within “X” hours of receipt of the order. SBC missed the standards for PMs 10.1, 10.2 and 10.3 for the three months of PM data it submitted, however SBC argued that a correction is not needed since the CLECs had agreed to modify the standards in the upcoming six month collaborative such that the Company would meet the new standards.

PM 13 measures the mechanical flow-through of orders as a percentage of all orders. SBC stated that its results were consistently above 76% for all categories, and that it met the requirements of the 24 Month Performance Plan negotiated with the CLECs. Further, SBC implemented nine enhancements during 2002, and planned eight more enhancements in the coming year.

PM 17 examines the percent of on-time service orders in both ACIS and CABS that are reported/posted within a designated time interval. SBC stated that the standard set forth in the Master Test Plan does not match PM 17, which is the percentage of orders posted within one bill cycle. Regardless of the discrepancy in the standards, SBC contended that its bills are timely, that over 90% of orders are posted within one cycle, and that those orders that are not posted within one billing cycle have no impact on a CLECs ability to bill its end users. Further, SBC anticipated PM 17 to be revised during the next six-month collaborative process. Finally, SBC asserted that no formal improvement plan is necessary.

PM MI-2 measures the percentage of orders given jeopardy notices within 24 hours of the due date. SBC stated that the shortfall in PM MI 2 performance is attributable to the current “parity” standards. SBC argued that the parity standard is based on a pseudo-measurement for retail orders that reflects what might be reported if jeopardy notices were actually provided. Further, the difference between current performance and the benchmark was not significant.

PM MI-14 measures the percentage of completions notifications returned within “X” hours. SBC explained that the principal source of the delays in notices was the fax process used for sending notices for trouble tickets that were submitted manually (CLECs that submit trouble tickets electronically receive notice of maintenance work via the applicable interface). Effective February 1, 2003, SBC asserted, it is no longer sending manual notices by fax but by posting them to a web site.

Based on its review of the PM data submitted, Staff opined that SBC did not meet the standard for PM 7.1 in any of the three months. The benchmark is that 99% of all completions will be returned within one day, and SBC’s performance for the three months was indicated as 54%, 46% and 70%.

In addition, Staff argued that the PM data submitted by SBC showed that it consistently failed to meet the benchmark for PMs 10.2 and 10.3, whereas it inconsistently meets PM 10.1.

Staff determined that SBC failed to achieve the standards for PM13 in two

out of three months of PM data provided, for 4 of the 6 disaggregations. Staff pointed out that the Company was required to meet the parity requirement and benchmark requirements established and it was not meeting these for PM 13. In looking at the PM data for PM 13.1, the companion performance measure to PM 13, the Company, on a whole, was flowing through fewer orders for UNE Loops, Resale and LNP now than it did twelve months ago.

Staff's review of the PM data for PM17 found that the Company failed to provide those services in parity with SBC's affiliate in any of the three months provided. Further, Staff's investigation found that only twice during 2002 did SBC provide PM 17 related services to CLECs in parity with its affiliate operations.

Further, Staff alleged that SBC's data showed that it did not meet the standard for PM MI 2 in any of the three months, for submeasures MI 2-2, MI 2-8 and MI 2-10. And, Staff argued that since the performance never surpassed the 66% level, changing the parity measure to a benchmark would not appear to resolve the problem. So too, the data submitted by SBC shows that it did not meet the standard for PM MI 14 for submeasures MI 14-1, MI 14-3, MI 14-4 and MI 14-5.

### **ICC Analysis and Conclusion – Key Performance Measures**

The ICC generally agreed that the PMs related to OSS need to be improved, however, the ICC understood that the standard for PMs 10.1, 10.2 and 10.3 had been revised, and that SBC would pass the revised standards. Therefore, SBC needed to remedy unsatisfactory performance related to PMs 7.1, 13, 17, MI-2 and MI-14 by November, 2003 or it might face additional penalties.

With respect to PM 13 in a nondiscriminatory manner, SBC's data showed a failure to meet the standards in two of the three months of PM data provided by SBC, for four of the six disaggregations. Review of data from December 2002 and January 2003 showed the Company continuing to fail the standards for the four sub-measures (UNE-P, Resale, LSNP and UNE Loops). Looking at the Company's performance in PM 13.1, the companion measure to PM 13, the Company's total order process percent flow through for three of the six disaggregations have decreased over the past year. This appeared to suggest that the Company was flowing through fewer orders for UNE Loops, Resale and LNP now than it did twelve months ago, and gave rise to our concern for added improvement. As such, PM 13 was added to the list of Key Performance Measurements requiring improvement, as set forth in the Commitment List.

Staff reported that SBC's performance measures with respect to billing were generally satisfactory, with one exception for PM 17-timeliness. This appeared to have been a persistent problem over the last year, with little improvement. Given that this measure was soon to be revised, SBC recommended that the ICC not adopt a formal improvement plan at this time, but should subject PM 17 to the additional monitoring. The ICC found this

recommendation to be reasonable and so directed the Company to comply in all particulars.

**(I) Nondiscriminatory Access**

**(i) Account Ownership Process**

McLeod sought a new process to implement a change of billing information when a CLEC changes ownership because of a merger. McLeod contended that each and every OSS used by SBC-Illinois to process orders, trouble ticket listings, call termination, line termination, etc., continues to retain incorrect carrier identification codes because there is no process in place as would account for a CLEC being acquired by another CLEC. The lack of such process to implement changes of account ownership, McLeod argued, requires it to order service as two separate operating entities, and check its records to verify which entity is operating in a central office according to SBC- Illinois' records. Recognizing that this issue has not previously arisen in the context of a Section 271 proceeding, McLeod nevertheless maintained that it should be considered on the basis of general non-discriminatory access to OSS.

SBC Illinois' indicated that the Company does have a process in place for a CLEC being acquired by another CLEC. If McLeod desires to change the CLEC information listed on customer service record (after a merger or acquisition), SBC Illinois explained that it need only issue service orders to that effect.

In reply to McLeod's call for a non-discriminatory process, SBC asserted that the process that the Company has in place for its retail customers is the same process offered to the CLECs. In other words, no "mass conversion" process exists on the retail side such that SBC-Illinois must issue an individual service order for each end-user account that needs to be converted, the same and no different as McLeod is required to do.

**ICC Analysis and Conclusion – Account Ownership Process**

The ICC viewed the requirement that McLeod requested as going beyond Section 271 requirements and unsupported by any authority. Having considered all the arguments and positions, the ICC failed to find any viable Section 271 compliance problem in this instance.

**(ii) LSOG 5**

AT&T urged the Commission to require SBC to submit test results for the OSS interface that will be in use at the time of SBC's section 271 application. BearingPoint conducted its EDI testing on the LSOG 4.0 interface, which is currently used by almost all EDI-user CLECs in the SBC Midwest region. According to the SBC 12-Month Development view revised by SBC on November

1, 2002, AT&T alleged, SBC will be retiring LSOG 4.0 in *June 2003*. As such, the ICC will be attesting to the ability of SBC's OSS to support competition into the indefinite future based on the test results from an interface that will be supplanted by a newer one only two months after its review. AT&T stated that the better course of action is to perform testing on the future interface, and this would ensure that testing would occur on the interface that would be in place at the time of SBC Illinois 271 application to the FCC.

SBC indicated that although BearingPoint did not formally test LSOG 5.0, SBC has submitted transactions over the LSOG 5.0 GUI since April 2002, and has tested the agreed Change Management Process pursuant to which LSOG 5.0 was implemented. Further, the Company asserted that the LSOG 5.0 interface is identical to the interface used in California, where the FCC granted section 271 approval and expressly rejected AT&T's arguments that LSOG 5.0 was not tested.

### **ICC Analysis and Conclusion – LSOG 5**

While AT&T appeared to take issue with BearingPoint's testing of LSOG 4.0, without including LSOG 5.0, BearingPoint did test the agreed Change Management Process, pursuant to which LSOG 5.0 was implemented. Further, the ICC saw no requirement that OSS testing need be repeated on each new interface introduced. The ICC noted that to require otherwise would result in testing that may never be completed.

#### **(iii) Network Outage Notifications**

RCN contended, and SBC acknowledged, that when the Company is aware of a potential network outage, it indiscriminately sends an email to every CLEC on its outage list. RCN complained of this practice for reason that it is required to shift through the hundreds of emails each week to determine if a network outage will affect it. RCN recommended that SBC filter outage notifications and only send notifications to CLECs directly affected by the outage. SBC indicated that this blanket approach is the only practical means of notifying CLECs of outages and that no CLEC has recommended a better option. RCN countered that the burden should not be on CLECs but on SBC to alleviate this problem, as it is SBC's burden to prove compliance with 271.

### **ICC Analysis and Conclusion – Network Outage Notifications**

The ICC directed SBC to meet with and educate RCN on its network outage notification procedures, making sure RCN is included in SBC's network outage notification systems and is well advised of network outages. In Phase II, SBC testified that a training session with RCN had taken place and that this issue is thereby resolved.

## **F. ICC Findings and Recommendation – Checklist Item 2**

The ICC's ultimate conclusion on Checklist Item 2 compliance was based on the totality of the law, facts, and circumstances. Without doubt, SBC Illinois, BearingPoint and Hewlett Packard Consulting ("HP"), together with the able assistance of the ICC Staff, and with full CLEC participation, have successfully engaged in one of the most comprehensive OSS Operational tests in the nation. Based on the wide array of commercial performance measures, and that BearingPoint has determined that the vast majority of those measures that relate to OSS have passed the evaluation criteria, the ICC saw SBC's commercial performance results to demonstrate that the Company processes high volumes of commercial transactions with a high rate of success. The few shortfalls in performance are not material to the overall perspective, when taking account of the fact that SBC had committed to enforcing specific action plans in the most important areas that the ICC resolved to oversee.

In the ICC's view, the results presented in the BearingPoint Report persuasively reaffirm the results of commercial performance. Indeed, SBC fully satisfied 467 of 492, or 94.9% of the applicable test criteria. Of the remaining test criteria, 7 were categorized as "Indeterminate" due to a lack of demand for the product or function under evaluation. If one were to exclude these criteria, SBC's success rate would increase to 96.3% (467 of 485 applicable test criteria). Further, one of the 18 remaining criteria was resolved subsequent to BearingPoint's Report.

With respect to the provisioning of UNEs, the ICC was satisfied by the Company's showing of compliance with all federal requirements. It specifically found that SBC Illinois provides CLECs nondiscriminatory access to UNE combinations, including the UNE-P, in accordance with the requirements of Checklist Item 2.

Regarding the UNE pricing component, the ICC was satisfied that the resolutions set out by SBC and Staff were reasonable on the pricing issues that had been agreed upon. As such, SBC Illinois was directed to file the rate changes within 45 days of the date of the ICC's Final Order, i.e., May 13, 2003. The ICC determined that SBC Illinois had shown that its permanent UNE rates meet with TELRIC standards and that its interim rates fall within the "zone of reasonableness".

In their respective positions on Checklist Item 2 compliance, certain of the parties also raised disputes with respect to NIDs, Migration "as is" Orders, as well as a proposal to cap rates for a five-year period. The ICC found that each of these matters arose under state law or were otherwise not mandated by any federal authority. Thus, the ICC referred and addressed these issues under its public interest analysis. See Part V of this Report.

## CHECKLIST ITEM 3 – POLES, DUCTS, CONDUITS, and RIGHTS-OF-WAY.

### A. Standards for Review

Pursuant to Section 271(c)(2)(B)(iii), SBC is required to provide “[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by [it] at just and reasonable rates in accordance with the requirements of [47 USC 224].” Regarding access, section 224(f)(1) provides that “[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”<sup>103</sup> The 1996 Act amended section 224 in several important respects to ensure that telecommunications carriers, as well as cable operators (for whose benefit Section 224 was originally enacted), have access to poles, ducts, conduits, or rights-of-way owned or controlled by utility companies, including LECs.<sup>104</sup>

Regarding rates, section 224(b)(1) states that the Commission shall regulate the rates, terms, and conditions governing pole attachments to ensure that they are “just and reasonable.”<sup>105</sup> Notwithstanding this general grant of authority, section 224(c)(1) states that “[n]othing in [section 224] shall be construed to apply to, or to give the Commission [FCC] jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in [section 224(f)], for pole attachments in any case where such matters are regulated by a State.”<sup>106</sup> The 1996 Act extended the Commission’s authority to include not just rates, terms, and conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way.<sup>107</sup> Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. As of 1992, nineteen states, including Illinois, had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.<sup>108</sup>

### B. The State Perspective

The ICC addressed the issue of pricing such access in Docket 98-0397. Order, Docket 98-0397, Illinois Commerce Commission On Its Own Motion Investigation into Rates, Terms and Conditions Applicable to Poles. (August 14, 2001) The Commissions rules regarding pole attachments are found in 83 Ill. Administrative Code Part 315.

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<sup>103</sup> 47 U.S.C. § 224(f)(1).

<sup>104</sup> Second BellSouth Louisiana Order, 13 FCC Rcd at 20706, n.574.

<sup>105</sup> 47 U.S.C. § 224(b)(1).

<sup>106</sup> *Id.* § 224(c)(1).

<sup>107</sup> Local Competition First Report and Order, para. 1232; 47 U.S.C. § 224(f).

<sup>108</sup> See States That Have Certified That They Regulate Pole Attachments, Public Notice, 7 FCC Rcd 1498 (1992); 47 U.S.C. § 224(f).

### **C. SBC Illinois' Demonstration Of Compliance**

SBC Illinois points out that no party disputes that it meets the requirements of Checklist Item 3. As such, CLECs can access SBC's poles, ducts, conduits, and rights-of-way pursuant to an ICC-mandated tariff or pursuant to Appendix ROW, which has been incorporated into several interconnection agreements approved by the ICC, including those with American Fiber Network, Inc. and MGC Communications, Inc. Both Appendix ROW and the Structure Tariff, SBC asserted, fully comply with applicable federal and state regulations.

### **D. Parties' Positions, Arguments and Evidence**

AT&T indicated that at the time of filing its Phase I testimony, it was unaware of any noncompliance issues. When filing its Phase I briefs, however, AT&T claimed to have discovered that beginning the end of May 2002, SBC has attempted to bill AT&T the \$1.69 rate twice a year or, every six months. In this regard, AT&T noted that the ICC Order in Docket No. 98-0397 adopted a just and reasonable rate in accordance with the requirements of section 224 of the Act of \$1.69 per pole attachment per year. Having not yet determined the source of this potential problem, AT&T indicated that it would raise the issue, if warranted, in Phase II of this proceeding.

### **E. Performance Data Review**

According to Staff, there are two performance measures associated with access to poles, rights-of way, and conduits. These are PM 105 (Percent request processed within 35 days), and PM 106 (Average days required to process a request). Staff determined that SBC's reported performance relative to checklist item 3 is satisfactory.

SBC stated that during the September - November 2002 study period, it processed every CLEC request for access to poles, ducts, conduits, and rights-of-way within the 35-day benchmark. In fact, SBC processed these requests within an average interval of only 13.5 business days. Further, SBC stated that it completed every request for make-ready work and every request for a field survey within the standard interval.

### **F. ICC Findings and Recommendation – Checklist Item 3**

No party disputed SBC's satisfaction of the statutory access requirements at issue. Staff further observed that the Company satisfies the rates standard.

To be specific, the ICC found that SBC has demonstrated that it is providing nondiscriminatory access to its poles, ducts, conduits and right-of-way at just and reasonable rates, terms, and conditions in accordance with Section 224 of the Act.

With respect to AT&T's comments, the ICC noted at the outset, that there was no evidence, only argument, alluding to a potential dispute that may or may not materialize. No such showing on the matter was ever brought before the ICC in Phase II of its investigative proceeding.

#### **CHECKLIST ITEM 4 – UNBUNDLED LOCAL LOOPS.**

##### **A. Standards for Review**

Section 271(c)(2)(B)(iv) of the Act, requires that a 271 Applicant provide: “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services[.]” 47 U.S.C. Section 271 (c)(2)(B)(iv). A BOC demonstrates compliance with Checklist Item 4 by showing that it has “a concrete and specific legal obligation” to furnish loops, and further, that it offers unbundled local loops in the quantities that competitors demand and at an acceptable level of quality, regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor, as well as nondiscriminatory access to unbundled loops and to line splitting. “The loop” is defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. A loop comprised of copper cable can be divided into a high frequency path, for data transmission, and a low frequency path to provide voice service. When an incumbent provides voice and a competitor data, the arrangement is “line sharing”; when one competitor provides voice and another data, that arrangement is “line splitting”.

The unbundling of the high frequency portion of the loop is addressed in Orders FCC 99-355 and FCC 01-026. The DC Circuit Court remanded the FCC’s line sharing rules in May of 2002.

##### **B. The State Perspective**

The ICC has addressed line sharing/line splitting in Docket Nos. 00-0312/0313, 00-0393, and 00-0393. See Arbitration Decision, Docket No. 00-0312, Covad Communications Company, Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a (August 17, 2000). Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, Arbitration Decision, Docket No. 00-0313 (Consol). Rhythms Links, Inc., Petition for Arbitration Pursuant to

Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues;

Order, Docket No. 00-0393, Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service (Tariffs Filed April 21, 2000) (March 14, 2001) ; Amendatory Order, Docket No. 00-0393 (May 1, 2001) ; Order on Rehearing, Docket No. 00-0393 (September 26, 2001); Amendatory Order on Rehearing (October 16, 2001), Docket No. 00-0393; Order on Second Rehearing, Docket No. 00-0393 (March 28, 2002).

### **C. SBC Illinois' Demonstration of Compliance**

SBC acknowledged that it has a binding legal obligation to make available all required kinds of loops pursuant to interconnection agreements. SBC further asserted that it provides CLECs the ability to obtain and use the Network Interface Device ("NID"), a device at the customer premises that is the accepted termination point of the local loop, under terms and conditions established in interconnection agreements. SBC further contended that CLECs can order all sub-elements of the loop that the FCC requires from it on an unbundled basis and access these sub-elements at technically feasible accessible points.

SBC noted that its Coordinated Hot Cut ("CHC") process meets applicable requirements, and that it provides CLECs with technical resources to address such issues as the timing of the hot cut, and whether the facilities in question technically qualify for the Coordinated Hot Cut process.

SBC stated that it must on occasion modify facilities to fill a CLEC order, and has adopted a Facility Modification process ("FMOD") to provide CLECs with ongoing notice as to the status of such orders. Where a modification is "complex", requiring non-routine work and associated charges, SBC gives specific notice of this to the CLEC. SBC contended that it has an established, detailed process for "tagging" loops at customer premises so a CLEC knows which loop has been activated for its use. Isolated problems related to tagging have been addressed and rectified.

SBC noted that the FCC requires BOCs to provide loop qualification<sup>109</sup> information as part of the pre-ordering functionality of OSS. SBC stated that it provides loop qualification information in compliance with this requirement, within five business days. SBC maintained that it has standard, nondiscriminatory ordering procedures in place for ordering loops over which a CLEC can provision ADSL, HDSL, or IDSL. In addition, CLECs can provision other forms of DSL that can technically acceptable be deployed over DSL-capable loops. The Company's

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<sup>109</sup> "Loop qualification" is the process of obtaining information about a loop's characteristics, such as its length, and the existence of accreted devices like load coils, in order to evaluate whether the loop can support advanced services.

rates for bridged tap conditioning, a species of loop conditioning, can be readily determined.

SBC asserted that it provides line sharing on terms and conditions identical to those offered by its affiliates in other states. It provides splitters -- devices necessary to use the high frequency portion of the loop (HFPL) -- on a line-at-a-time basis, although it is not required to do so. SBC rejected claims that it had failed to provide access to the HFPL over fiber-fed loops, as it offers, pursuant to ICC order, a broadband end-to-end HFPL UNE, as well as an HFPL subloop UNE. SBC further observed that the concept of HFPL is meaningless with fiber loops, as the HFPL only exists on copper facilities. In any case, SBC allows access to copper loops at any feasible subloop access point, and permits leasing of “dark” (unused) fiber facilities.

SBC averred that it has no obligation to provide line splitting, which is not a UNE; instead, prior to the USTA<sup>110</sup> decision, it was required to permit competitors to *engage* in line splitting, using their own splitters, an obligation to which the Company is no longer subject. SBC nonetheless offers line splitting consistent with its pre-USTA obligations, and will continue to do so. Accordingly, it urged rejection of contrary CLEC arguments. SBC argued that line sharing and line splitting over UNE-P are both technically infeasible, which the ICC has recognized in certain of its orders. SBC further contended that it has no obligation to provide unbundled access to the HFPL alone when it does not provide voice grade service to the end user, which it claimed is amply supported by FCC rules and orders.

SBC contended that CLEC proposals would require, variously: (1) a data CLEC to continue providing data service over the HFPL when an end-user transfers its voice service from SBC to a CLEC, in violation of the FCC’s pre-USTA rules; (2) SBC to permit line splitting in situations beyond where one or more CLECs purchases an entire unbundled loop and provides a splitter; (3) SBC to migrate voice service even where the data CLEC has not approved of the arrangement; (4) SBC to combine UNEs with the splitter, which is not a UNE; and (5) SBC to manage the relationship between CLECs engaged in line splitting even though SBC has no relationship with the end-user. SBC contended that it has no legal obligation to do, and indeed may be precluded from doing, any of these things. SBC noted that WorldCom’s allegations of improper rejection of their service orders for line-splitting are therefore without merit, as WorldCom had not obtained the permission of the data CLEC to use the facilities in question.

SBC contended that it has no legal obligation to implement a “single order process” (enabling a CLEC to order all necessary UNEs with a single order) for any product, including line sharing/splitting, although it is implementing such a process. SBC’s current multiple local service order requirement is temporary. SBC noted that the FCC has not required it to offer the individual elements of its

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<sup>110</sup> US Telecom Ass’n v. FCC, 290 F.3d 415, 422; 2002 U.S. App. Lexis 9834 (DC Cir. 2002).

Project Pronto architecture<sup>111</sup> on an unbundled basis; SBC is only required to provide a wholesale end-to-end broadband service, and to permit collocation in remote terminals. SBC noted that the ICC requires it to offer the Project Pronto architecture as an end-to-end broadband UNE, but this is not, in any case, a requirement of Section 271.

## **D. Parties' Positions, Arguments and Evidence**

### **1. Line Splitting**

The ICC examined SBC's obligations in three different scenarios:

*Scenario A* -- SBC provides voice service, but no data service is provided to the customer; the CLEC wins the customer and orders the line to be converted to UNE-P and orders connections to a splitter in order to provide data service. This would require disconnection and insertion of a CLEC-owned splitter since SBC has no obligation to provide a splitter in this situation.

*Scenario B* -- SBC provides voice service and a Data CLEC provides data services. A CLEC wins the voice service of the customer and makes arrangements with the Data CLEC to continue providing data services. The voice CLEC submits an order for the migration of the voice service to UNE-P while the current splitter arrangement remains intact. In this scenario, the data CLEC provides the splitter.

*Scenario C* -- This is the same as Scenario B, except that SBC provides the splitter.

WorldCom asserted that Checklist Item 4 requires a BOC to demonstrate, *inter alia*, that a CLEC can replace an existing UNE-P (voice) configuration with an arrangement that enables it to provide voice and data service to a customer. This, according to WorldCom, entails the ability to order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM<sup>112</sup> equipment, and combine it with unbundled switching and shared transport, as well as satisfactory OSS performance. WorldCom contended that SBC does not comply with these requirements, and therefore does not satisfy Checklist Item 4. WorldCom noted that thousands of its line-splitting orders had been improperly rejected. SBC's attempt to blame such rejections on the involvement of CLEC owned splitters has no foundation in the record, WorldCom argued, in that the orders rejected by SBC "likely" involved many SBC-owned splitters. WorldCom stated that SBC does not have in place a process or procedure that allows CLECs to order UNE-P voice service provided via line splitting arrangements, and SBC has no

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<sup>111</sup> Consisting of copper distribution pairs, copper feeder pairs, "Next Generation" Digital Loop Carrier equipment, ADLU line cards, separate fibers for voice and data traffic.

<sup>112</sup> Acronym for Digital Subscriber Line Access Multiplexer, a device necessary to provide DSL service.

procedure in place to prevent disruption of a customer's service – both voice and data – when provisioning line splitting via UNE-P.

SBC Illinois observed that its line splitting procedures are identical to those approved by the FCC in Texas, Kansas, Oklahoma, Arkansas, and Missouri. SBC viewed WorldCom's complaint about the "rejection" of line splitting orders as nothing more than an attack on the need for gaining the data CLEC's permission to use the voice portion of the loop. SBC stated that it had conducted an analysis of the rejection of WorldCom's line splitting orders, after the Commission required it to provide one, and found that the orders were rejected for lack of consent to the arrangement by the data CLEC.

SBC noted that its federal line splitting obligations include only Scenarios A and B, and the FCC has found its California offerings, identical to Illinois, satisfactory for Section 271 compliance. SBC asserted that it has implemented a functional single order process for Scenario A, an assertion with which the Staff concurred. SBC further stated that, if a CLEC uses the prescribed order process, no physical changes to UNEs would occur. SBC stated that it has no federal obligation to provide line splitting under Scenario C, but recognizes that it has a limited obligation to do so under state law, and offers line splitting consistent with this obligation. Neither Staff nor CLECs raised any specific concerns regarding Scenario C.

Chief among the CLECs' line splitting concerns, AT&T argued, is what it identified as SBC Illinois' "versioning" policy. As AT&T explained it, this alleged "versioning" policy requires that voice and data CLECs wishing to team together to provide local telecommunications services use the same version of the EDI interface when the data carrier submits to SBC data service orders (e.g., line splitting orders) using AT&T's OSS codes.<sup>113</sup> According to AT&T, this is a practical impossibility and will doom any attempt by CLECs to partner with each other to provide joint service on any significant scale.

AT&T also introduced two additional scenarios: conversion of line splitting back to voice service only, and requests to go from line sharing to line splitting while changing the splitter and data provider. With respect to the first new scenario, AT&T argued that SBC's policy and processes regarding migration of line splitting to voice-only UNE-P are at best ambiguous, unworkable through a single order process without changes to the existing loop configuration, and therefore discriminatory to CLECs, as SBC affiliates are not subject to such obstacles. AT&T noted that the SBC witness who testified regarding this matter was found to have filed an affidavit containing false averments of fact before the FCC, and her testimony therefore ought not to be credited.

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<sup>113</sup> The versioning problem came to light as CLECs attempted to determine how to work around SBC Illinois' insistence that only one carrier i.e., the voice carrier, act as the "carrier of record" in a line splitting situation. SBC will only recognize line splitting orders from the carrier of record on a particular loop, usually the voice CLEC. SBC's versioning policy makes it impossible for the data carrier to send these orders using the voice carrier's OSS codes. (Phase II AT&T Ex. 3.1, ¶ 42).

SBC responded to the allegations regarding the first new scenario by stating that the CLEC may either order UNE-P, or use the existing DSL-capable loop to provide voice. As to the second new scenario, SBC argued that AT&T's discussion involves an entirely new set of facts where there is a change in the splitter arrangement, and that this would be well outside the scope of the Phase I Order.

AT&T contended that SBC's line splitting processes do not work and are inherently discriminatory. It stated that these processes were not subject to testing by BearingPoint. SBC Illinois cannot claim that it has the capability to provide line splitting until it can demonstrate that it can provision line splitting orders on a commercial basis.

SBC responded by noting that AT&T endorsed this very process when used by SBC California. Moreover, SBC's witness stated that AT&T has used this process in California to process a substantial number of orders. SBC also argued that it made the single LSR process available in August 2002 and that it cannot be penalized because CLECs have not used the process yet for commercial volumes. In response to AT&T's contention SBC has not made this line splitting order process widely available anywhere in its service territory, SBC asserted that the single LSR process is available in all 13 states within SBC's service territory.

AT&T asserted that to satisfy Checklist Item 4, SBC Illinois must permit a voice CLEC, by itself or with a data CLEC, to offer both voice and data services over one loop, and to do so without unnecessary interruptions of service when a UNE-P customer converts to line splitting. AT&T stated that SBC considers this a new combination of UNEs, and thus requires competitors to order new loops and other UNEs and pay non-recurring charges, and customers to suffer service interruptions. AT&T claimed that existing law does not support this position, and that SBC must ensure that UNE-P/line splitting scenarios are treated as UNE-P for ordering, maintenance, testing, repair, and pricing purposes.

In Docket No. 01-0614, AT&T contended, the ICC interpreted Section 13-801 of the PUA and concluded that, in those circumstances where SBC provides voice service and the end user also subscribes to data service, SBC must transfer the voice service, if requested, to a UNE-Platform voice provider with all current features in place and "without any disruption to the end user's services." See Order at 32, Docket No. 01-0614, (June 11, 2002). In order to prevent any loss of features or any disruption, AT&T noted, the Commission determined that if SBC is providing the splitter, it must continue to do so after the voice service has been migrated. This obligation, AT&T contended, arises pursuant to Section 13-801 of the Illinois Act and was enacted to impose additional state requirements as contemplated by Section 261(c) of the 1996 Act.

As such, AT&T argued, the ICC has already rejected each and every one of the arguments made by SBC as to why this very line splitting arrangement

should be rejected. On this basis, SBC has failed to demonstrate that it meets its line splitting obligations and, as such, failed to satisfy Checklist Item 4.

SBC contended that intervenors seek to extend line splitting beyond what it is: a voluntary arrangement between CLECs. By requiring line splitting over UNE-P, intervenors would impose a requirement that SBC unbundle the low frequency portion of the loop, and require non-consenting third-party data CLECs to line split, neither of which, in SBC's view, is currently required by the FCC, and which may be prohibited.

As for SBC's alleged requirement to provide the splitter, no checklist requirement is implicated in this situation, SBC contended, because SBC Illinois cannot be required to provide splitters under federal law (as the FCC held and the ICC has acknowledged). Nevertheless, SBC observed that the ICC recently held that SBC Illinois must provide splitters as part of a "platform" of network elements under state law, i.e., section 13-801 of the PUA). SBC Illinois maintained that it had filed a tariff that complies with the Commission's Order in Docket No. 01-0614, such that even the requirements of state law, have been met.

AT&T asserted SBC's use of successive versions of its Access Carrier Name Abbreviation causes unnecessary rejection of orders. These defects constitute barriers to entry to CLECs, but not to SBC affiliates, and must be rectified before Checklist Item 4 is satisfied.

## **2. Project Pronto**

AT&T asserted that to satisfy Checklist Item 4, a BOC must show, *inter alia*, that it offers CLECs access on an unbundled basis to the entire NGDLC<sup>114</sup> loop, a requirement that SBC fails to satisfy, as it refuses to provide CLECs with unbundled loops using Project Pronto technology. SBC is required, AT&T contended, to make its loop facilities using NGDLC technology available as unbundled network elements with rates, terms and conditions governed by Sections 251 and 252 of the Act. According to AT&T, however, SBC has steadfastly refused to provide competitive carriers with unbundled loops provisioned using the Project Pronto technology. AT&T averred that unequal access to the Project Pronto network is discriminatory, and prohibited by FCC loop and subloop unbundling requirements, and its deficiencies are not cured by SBC's wholesale broadband offering.

AT&T contended that the Commission's Order on Rehearing, entered September 26, 2001, in Docket No. 00-0393, required SBC to file a tariff that "mirrors" the tariff language attached as Appendix A, as modified. All references to "UNE-P" or the "UNE-Platform" never made it into the tariff SBC filed, thereby depriving CLECs of their Commission-ordered right to provide voice service over

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<sup>114</sup> Acronym for Next Generation Digital Loop Carrier, a pair gain device that permits use of the HFPL.

the Project Pronto network using the UNE-Platform, AT&T noted. Contrary to the tariff language it was required to mirror, AT&T argued, not once does SBC's tariff contemplate, much less provide for, a voice and data configuration whereby the CLEC voice provider provides local service via the UNE-Platform. In addition to the missing language, AT&T asserted, there are over 20 places in which SBC inserted language that does not exist anywhere in the tariff it was required to mirror. The whole point of Ameritech's restriction, AT&T argued, is to deny an end user, receiving both voice and high-speed data services via the Project Pronto network, of the choice of another voice provider. AT&T argued that SBC's non-compliance with the ICC's Line Sharing Orders<sup>115</sup> showed that the company has not complied with Checklist Item 4.

SBC noted that it provides access to loops served via the NGDLC architecture, and therefore had established a *prima facie* showing that it provides non-discriminatory access to unbundled loops. Moreover, SBC noted that the ICC has required it to provide an end-to-end broadband UNE, rather than to unbundle its Project Pronto architecture. It urged rejection of AT&T's argument that its tariffing of this broadband UNE fails to mirror the ICC's order since its tariff is under ICC review.

SBC reemphasized that the FCC reviewed SBC/Ameritech's planned "Project Pronto" architecture in a nine-month proceeding, and issued its Project Pronto Order in 2000. So too, the ICC reviewed and reheard Project Pronto issues in Docket No. 00-0393, and its final order is now before the federal courts.

AT&T ignored Docket No. 00-0393 altogether, SBC contended, by insisting that "Ameritech Illinois should be required to unbundle the Project Pronto network." As such, SBC argued, AT&T is hoping the ICC will disregard Docket No. 00-0393 and order unbundling of all the various piece parts of the Project Pronto DSL architecture. The FCC and the ICC however, SBC noted, have both rejected that request.

SBC noted AT&T and WorldCom's contentions that SBC Illinois failed to comply with the ICC's Order in Docket No. 00-0393, because its compliance tariff did not mimic verbatim an appendix to that order. This issue, SBC maintained, is not an appropriate subject for this proceeding. Any new compliance issues can and should be resolved either through a Staff review process or through a separate compliance investigation. The record in this proceeding, SBC contended, is wholly inadequate to resolve the issues raised by AT&T and they are not appropriate to this proceeding. According to SBC, the removal of the UNE-P provisions – to which AT&T took particular exception – reflects the fact that the CLECs did not ask for, much less receive, the right to provide voice service over the Project Pronto network using the UNE-Platform.

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<sup>115</sup> See, *generally*, Illinois Bell Telephone Company: Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, ICC Docket No. 00-0393, *Order* (March 14, 2001) (hereafter "Initial State Line Sharing Order") *Order on Rehearing* (September 26, 2001) (hereafter "State Line Sharing Order on First Rehearing"); *Order on Second Rehearing* (March 28, 2002) (hereafter "State Line Sharing Order on Second Rehearing")

The ICC initiated Docket No. 03-0107 after Phase II of this proceeding was initiated by suspending the Broadband UNE tariff revisions filed by SBC Illinois in January 2003. Among other things, the new investigation will examine how the findings in the FCC's Triennial Review Order affect the Commission's decisions on SBC's Project Pronto obligations. AT&T contended that SBC Illinois has failed to comply with the Commission's Line Sharing Orders in numerous respects but agreed with SBC and Staff that the issue of whether SBC Illinois' Broadband UNE tariff complies with the ICC's Orders should be addressed in Docket No. 03-0107. Staff also disputed SBC's compliance with the ICC's Line Sharing Order, but concurred in the notion that the matter is properly addressed in the new compliance proceeding.

### **3. Other issues**

XO complained about SBC's performance during the coordinated hot cut process ("CHC"). XO cited certain cases where SBC provided only an all-day appointment, meaning that XO personnel would have to remain available for extended periods to accomplish a hot cut. XO sought a requirement that SBC be required to discontinue this practice, adhere to time commitments, and pay penalties for failing to do so.

SBC indicated that a CHC is unavailable to a CLEC where the end user's existing facilities reside on Integrated Digital Loop Carrier ("IDLC") service. SBC contended that such a conversion requires additional work and an all-day appointment, because the existing IDLC facilities cannot be used and the loop must be transferred to a separate copper pair. SBC indicated, and later demonstrated, that it has instituted a hot cut process related to IDLC where it shortens the time commitment from 8 to 4 hours. No party disputed SBC's showing.

Staff observed that SBC Illinois' tariff requires CLECs to submit bona fide requests ("BFR") to obtain access to the HFPL at any location other than the central office, which is inconsistent with the presumption of technical feasibility. Staff considered that SBC's offering fails to comply with federal requirements, and accordingly recommended that SBC be required file tariff language providing CLECs access to unbundled sub-loops at technically feasible points.

SBC Illinois explained that its GIA offers to provide access to standard HFPL subloops, for which no BFR is required. While a BFR may be required for other forms of HFPL subloops that are not available as a standard offering (and for subloops offered under SBC Illinois' tariff), that requirement does not in anyway "shift the burden" to a requesting CLEC to prove technical feasibility. The BFR (a process that has been repeatedly approved by the Commission), SBC maintained, only requires the CLEC to submit enough information so that SBC Illinois can determine whether the request is technically feasible to provision. In the event that it were to deny the CLEC access to the requested

subloop on the grounds of technical infeasibility, SBC Illinois asserted, it would still bear the burden of proof.

Staff initially contended that SBC must implement a single order process for converting a CLEC's UNE-P service into the UNEs necessary for line splitting, which the company had yet to do, and recommended that the Commission require SBC to employ a single-order process for line-splitting. SBC noted that although the FCC has never required a single order process for any product, SBC Illinois initially asserted, and later demonstrated, that it has now deployed the single order process described by Staff.

Staff recommended that the ICC determine that sufficient comparability (and parity where achievable) between CLEC line splitting and SBC's own line sharing is essential to any determination we might make that SBC Illinois' local markets are irreversibly open to competition. Staff recommended that the company be held to the proper standard for nondiscrimination in line splitting -- parity between line splitting provided to CLECs and line-sharing provided to SBC's own affiliates. Staff contended this to mean that if the local loop provisioned in a line splitting arrangement is xDSL-capable, then from a network perspective CLEC line splitting and SBC Illinois' own line sharing arrangements are directly comparable.

SBC contended that it has no obligation to provide parity between line sharing and line splitting, as Staff suggested. First, SBC stated that there is no legal requirement that it do so. Second, it asserted that significant business and operational differences exist between the two arrangements, which militate against parity. Third, SBC noted that it is subject to the performance remedy plan, which affords it incentives to avoid discrimination. Fourth, SBC contended that it line shares with non-affiliated companies, and so has no incentive to discriminate.

Staff also stated that SBC had not fully complied with the state UNE Order. Specifically, Staff contended that SBC provide for the most efficient processes and mechanisms feasible (consistent with safety and reliability considerations) in order to minimize any technically unavoidable service disruptions in CLEC line splitting arrangements.

SBC argued that it is not required to demonstrate that its compliance tariff provides for the most efficient processes and mechanisms feasible (consistent with safety and reliability considerations) in order to minimize any technically unavoidable service disruptions and CLEC line splitting arrangements. SBC contended that this requirement is not found in the state UNE Order, but that it is willing to make such revisions.

## **E. Performance Data Review**

SBC contended that its commercial performance results demonstrate that it provides CLECs nondiscriminatory access to stand-alone analog and digital loops, inasmuch as the results reflected performance as good as, or better than that afforded SBC retail customers. Likewise, SBC stated that its performance results demonstrate that it provides CLECs nondiscriminatory access to standalone xDSL-capable loops, as these results meet or exceed applicable benchmarks or parity standards, with the exception of statistical parity for line sharing trouble report rates, which it contends were low and the shortfalls insignificant.

Staff contended that performance measure (“PM”) data indicates SBC meets benchmarks for installation timeliness and quality, and post installation maintenance and repair when installing stand-alone DSL loops, but shows that SBC does not meet FMOD process benchmarks. Staff noted that SBC’s provisioning to CLECs of DSL capable loops not requiring conditioning can be compared to its provisioning of such loops to its own affiliates, and that such a comparison shows SBC is not providing conditioning at parity to CLECs, and that the lack of parity is non-trivial, with SBC affiliates getting markedly better provisioning. This disparity does not exist with respect to stand-alone DSL loops with conditioning, Staff observed, because SBC does not provide such loops to its affiliates.

Staff stated that the performance measures used to assess SBC-caused missed dates for provisioning of DSL loops do not differentiate on the basis of whether such loops need conditioning, thus impairing the utility of these measures in determining whether provisioning disparities exist. The PM data nevertheless revealed SBC-caused missed due dates and delays in installation when provisioning for CLECs, that did *not* occur with when provisioning for its affiliate. SBC has, with respect to its installation provisioning of stand-alone DSL to CLECs, met applicable benchmarks, but does not provide service at parity. With respect to installation quality of stand-alone DSL loops, and various measures assessing trouble reports, the Staff again argued that SBC has met applicable benchmarks, but does not provide service at parity.

Staff further observed that SBC did not notify its affiliates that there were no available DSL capable facilities, but did so notify CLECs, and failed to meet the benchmark for giving such notice in a timely manner, although this was less pronounced with simple modifications than with complex. Staff recommended that, as a prerequisite to a finding that SBC is provisioning stand-alone DSL loops in accordance with the requirements of Item 4, SBC must take corrective action to ensure that notifications related to stand-alone DSL orders are sent in a timely manner.

Staff observed that, as is the cases with stand-alone DSL loops, SBC does not, in provisioning DSL loops with line sharing, provide conditioned loops to its affiliate. There appears to be no disparity in the company’s provisioning of these vis-à-vis its affiliates. Staff stated that the company’s performance with respect to provisioning DSL with line sharing, with conditioning, does not require corrective action when measured against the benchmarks established for DSL without line sharing, with conditioning. Likewise, the company is not missing due

dates because of SBC causes or lack of facilities more frequently for CLECs than it does for itself or its affiliate. Finally, total delay days for this activity are approximately equal between affiliates and CLECs. On balance, Staff concluded that the PMs measuring installation timing for DSL with line sharing indicate that SBC is providing installation of DSL service to CLECs at parity with the installation of DSL service it provides to itself and its affiliate.

Staff stated that the company's provisioning of installation of DSL with line sharing is of poor and diminishing quality, based upon recent performance data. Staff further argued that all maintenance and repair PMs indicate that SBC is not providing maintenance and repair service at parity, with nearly twice as many trouble reports per hundred CLEC loops as SBC affiliate loops. Staff recommended that the company be required to provide installation, maintenance and repair of DSL loops with line sharing at parity. Staff considered unconvincing SBC's explanations for this: errors in calculating the PMs, leading to the conclusion that no problem existed, and minor diagnostic problem, which the company claims to have rectified. Staff recommended that SBC be required to provide loop quality and maintenance and repair of DSL loops with line sharing at parity as a prerequisite to a finding that the Company is provisioning its DSL loops with line sharing as required by Section 271(c)(2)(B)(iv).

With respect to unbundled voice-grade loops, Staff noted that PM data shows SBC does not always meet parity in timely installation, a failure which may affect a CLECs' ability to compete. SBC meets parity standards with respect to SBC-caused missed due dates and due dates missed due to lack of facilities. With respect to loops with LNP, SBC generally meets benchmark installation intervals. SBC generally provides installation quality and repair and maintenance of installed voice grade loops at parity. SBC, however, fails parity criteria for meeting due dates for FMOD installations.

Staff observed that UNE loops are the network element most difficult for competitors to self-supply, and it is therefore vital that SBC perform acceptably. Accordingly, Staff recommended that SBC correct voice grade loop provisioning problems, and in particular the disparity in average installation intervals and missed customer requested due dates and the problems with provisioning voice grade loops requiring complex facilities modification, prior to any conclusion that SBC has satisfied Checklist Item 4.

With respect to unbundled digital (BRI) loops and DS1 loops, Staff observed that, based upon PM data, SBC provides service at parity – if not always in compliance with benchmarks – with respect to installation timeliness and provisioning quality. SBC is providing service at parity with respect to installation timeliness, installation quality, and repair and maintenance service; the only anomaly in the information is the extremely large delays to CLEC customers resulting from Company caused missed due dates in November 2002. Staff recommended that SBC be required to correct problems with provisioning DS1 loops requiring complex facilities modification prior to a finding that Checklist

Item 4 is satisfied. Staff further recommended that SBC be found to be meeting FMOD due dates for voice-grade loops, BRI loops, and DS1 loops.

#### **F. ICC Findings and Recommendation – Checklist Item 4**

The ICC found that it is undisputed that SBC's provisioning of voice-grade loops satisfies Checklist Item 4 and that the Company appeared to satisfy its subloop unbundling obligations.

##### **1. Line-Splitting**

At the outset, the ICC did acknowledge that the data CLEC must be a willing participant in any line splitting relationship and that WorldCom's apparent desire to line split without the consent of the data CLEC is not the type of situation that would lead it to find SBC deficient on this checklist item.

As previously established by the ICC, ILEC provisioning of a splitter is not a federal law requirement. Thus, compliance does not need to be shown here. By virtue of its Order in Docket No. 01-0614, however, and under state law, SBC must provide splitters as part of a platform of network elements. SBC indicated that it has filed a tariff to comply with the Order in Docket No. 01-0164.

Based on the record, the ICC found that SBC Illinois has made the requisite showings as directed by the Phase I Order. It was particularly persuaded by the fact that SBC Illinois uses the same line sharing/line splitting processes used in California that were reviewed by the FCC in the California 271 Application and found to comply with Section 271 requirements.

With respect to Scenario A, the ICC found that SBC Illinois had demonstrated that it has in place an operational process for the conversion of UNE-P to line splitting and that it administers that process in a nondiscriminatory manner. More important, the ICC found that SBC Illinois has in place a workable single order process for this scenario.

With respect to Scenario B, the ICC concluded that SBC Illinois has in place a streamlined process for migrations between line sharing and line splitting that avoids voice and data service disruptions and satisfies the FCC's requirement.

Finally, with respect to Scenario C, the ICC concluded that SBC Illinois offers ILEC-provided splitters as part of a platform of network elements. As a final matter, the ICC noted that the Company reports that there are no line splitting-specific charges that are not captured in rates for the individual elements that CLEC use in a line splitting arrangement. For this reason, it was not necessary to address any unique charges for line splitting.

The ICC rejected the AT&T/WorldCom attempt to input consideration of new line sharing/line splitting scenarios beyond those outlined in the Phase I Order. The ICC was quite clear in the Phase I Order in its identification of those specific scenarios that it directed SBC Illinois to address. These scenarios were based on an extensive Phase I record, on the law, and on a full and fair opportunity for CLECs to raise all line splitting/line sharing issues of concern and to do so in a clear and coherent fashion.

Regarding AT&T's concerns pertaining to SBC's versioning policy, the ICC acknowledged this situation is of recent vintage and, more importantly, AT&T did not address any of the three alternatives that SBC Illinois had set out as workable options to meet AT&T's needs. Thus, the ICC found that versioning concerns did not stand in the way of finding overall compliance with checklist item 4.

## 2. Project Pronto

AT&T provided arguments that either were or should have been presented in earlier proceedings. The only issue the ICC was interested in was the SBC tariff filed to comply with the ICC's Order in Docket No. 00-0393.

The ICC agreed with Staff, AT&T, and SBC that ICC Docket No. 03-0107 is the appropriate place to resolve any potential issues surrounding SBC Illinois' compliance with our orders concerning the Broadband UNE.

## 3. Other issues

Staff agreed that SBC Illinois has complied with the state UNE Order except that SBC Illinois has not demonstrated that its tariff provides for "the most efficient processes and mechanisms feasible (consistent with safety and reliability considerations) in order to minimize any technically unavoidable service disruptions in CLEC line splitting arrangements. This did not appear to be a Section 271 compliance issue and the ICC required nothing further for Section 271 compliance purposes.

As for the line sharing/line splitting parity, Staff pointed to no authority for its position that there is a present legal obligation for SBC Illinois to provide two distinct arrangements – line sharing and line splitting – in parity with one another. The ICC declined to require anything further of the Company on this issue. Nonetheless, it noted that the Company had proposed tariff language that would establish some degree of comparability between the Company's provisioning of the UNEs necessary to support a line splitting arrangement on the one hand, and the Company's provisioning of HPFL necessary to support a line sharing arrangement on the other hand. Whereas this proposal is not mandated in order to establish the Company's compliance with Checklist Item 4, the ICC saw the benefit in the Company's proposal and directed the Company to file this tariff modification within 30 days of the date of our Phase II Order.

The ICC also found that SBC had addressed the IDLC hot cut issue to the ICC's satisfaction.

SBC performance results demonstrated that it provides nondiscriminatory access to unbundled loops in accordance with the requirements of Checklist Item 4. There are disparities in performance, but these are generally minor and, in many instances the volume of affected transactions was low. SBC had already taken many steps to improve its performance on the relatively few sub-measure deficiencies, and those improvements will be verified through the ICC's adoption of SBC's proposal for the further monitoring of certain PMs. See attachment A for the latest status report on these improvements. Staff will continue monitoring and checking for improvements with respect to these matters until otherwise directed. On the entirety of the evidence, the ICC found that SBC satisfies the requirements of Checklist Item 4.

## **CHECKLIST ITEM 5 UNBUNDLED LOCAL TRANSPORT.**

### **A. Standards for Review**

Section 271(c)(2)(B)(v) of the competitive checklist requires a Section 271 applicant to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C. § 271 (c)(2)(B)(v). BOCs must provide both dedicated and shared transport to requesting carriers. Second BellSouth Louisiana Order at para. 201. Dedicated transport consists of BOC transmission facilities dedicated to one customer or carrier that provide telecommunications between wire centers owned by BOCs or requesting telecommunications carriers, or between switches owned by BOCs or requesting telecommunications carriers. It is paid for on a circuit capacity basis. Shared transport consists of transmission facilities shared by more than one carrier, including the BOC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the BOC's network. It is paid for on a per-minute-of-use basis, and is a key element of the UNE-Platform.

### **B. The State Perspective**

The ICC, in its *TELRIC Order*,<sup>116</sup> set rates for dedicated transport, and ordered SBC to implement an interim shared transport rate. In its *Merger Order*, the ICC ordered SBC to tariff an unbundled local switching and shared transport

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<sup>116</sup> See *Second Interim Order, Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic*, ICC Docket No. 96-0486/0569 (February 17, 1998)(hereafter "TELRIC Order")

offering similar to what SBC offered in Texas.<sup>117</sup> The ICC ordered final rates for shared transport in its *TELRIC 2000 Order*.<sup>118</sup> SBC filed tariffs to comply with the *TELRIC 2000 Order* on August 21, 2002, which took effect on September 21, 2002.

### **C. SBC Illinois' Demonstration of Compliance**

SBC avers that shared transport cannot be provided independent of unbundled local switching, as it is technically impossible to use the same transport facilities without using the same switch. SBC provides shared transport in the form of "unbundled local switching with shared transport," or "ULS-ST" which CLECs can obtain through interconnection agreements or tariffs. It further provides shared transport for the provision of intraLATA toll service, and "terminating switching" as part of shared transport, although neither are in its view required by federal law, and neither showing is necessary for Section 271 approval.

### **D. Parties' Positions, Arguments and Evidence**

Z-Tel contended that SBC does not provide nondiscriminatory access to ULS-ST, as it does not allow CLECs to use shared transport to provide intraLATA toll service, as a matter of both federal and state law. Z-Tel maintained this is both a violation of state law and a failure to meet the competitive checklist.

Staff pointed out that SBC's *TELRIC 2000* tariff does not satisfy the requirements. Staff noted, to satisfy Checklist Item 5, SBC must amend its permanent ULS-ST tariff to provide for intraLATA toll capability, demonstrate that ICC-approved tariffs that provide for AIN-based custom routing capability (for Operator Services/directory assistance (OS/DA)) traffic as a component of SBC's ULS-ST offering are on file, and offer ULS-ST with a transiting function.

SBC argued that its *State UNE Tariff* obliges it to provide ULS-ST for intraLATA toll provision, terminating switching and transiting, and it therefore urged rejection of Z-Tel's arguments.

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<sup>117</sup> See *Order, SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois, and Ameritech Illinois Metro, Inc., Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois, and the Reorganization of Ameritech Illinois Metro, Inc. in Accordance with Section 7-204 of the Public Utilities Act and for All Other Appropriate Relief*, ICC Docket No. 98-0555 (September 23, 1999) (hereafter "Merger Order")

<sup>118</sup> *Order, Illinois Commerce Commission On Its Own Motion v. Illinois Bell Telephone Company: investigation into Tariff Proceeding Providing unbundled Local Switching with Shared Transport*, ICC Docket No. 00-0700 (July 12, 2002) (hereafter "TELRIC 2000 Order").

Z-Tel supported Staff's recommendation that SBC be required to amend its tariffs. It further argued that the ability to provide intraLATA toll over shared transport is now federally required, under a recent U.S. District Court decision.

#### **E. Performance Data Review**

No party raised any issue with respect to SBC's compliance with the *TELRIC 2000 Order*, except for the intraLATA toll issue, which was deemed satisfactory in Phase I. Accordingly, the ICC concluded that SBC Illinois satisfied the requirements of Checklist Item 5.

No party rebutted SBC's contentions that its provisioning, repair, and maintenance of ULS-ST exceed applicable PM benchmarks. It contended that this is borne out by the BearingPoint report.

#### **F. ICC Findings and Recommendation - Checklist Item 5**

The Commission preserved the parties' ability to raise further issues regarding SBC Illinois' compliance with the Commission's Order in Docket No. 00-0700 in Phase II. Although a final determination on Checklist Item 5 was deferred until Phase II, no further issues were raised. Further, the Commission noted that SBC and Staff subsequently stipulated that that SBC's ULS-ST offering permits intraLATA toll provision and SBC therefore need not make a further showing regarding this matter.

There was no dispute regarding SBC's nondiscriminatory provisioning and maintenance of unbundled local transport, this matter, and the adequacy of SBC's performance is confirmed by the Bearing Point report. Moreover, no party raised any additional issues with respect to SBC's compliance with the *TELRIC 2000 Order*. Accordingly, the ICC found that SBC satisfied Checklist Item 5.

### **CHECKLIST ITEM 6 – UNBUNDLED LOCAL SWITCHING.**

#### **A. Standards for Review**

Section 271(c)(2)(B)(vi) of the 1996 Act requires that a 271 Applicant provide "[l]ocal switching unbundled from transport, local loop transmission, or other services." 47 U.S.C. § 271(c)(2)(B)(vi). BOCs must provide unbundled local switching that included line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch - the basic switching function, the same basic capabilities that are available to the incumbent LEC's customers, and all

vertical features that the switch is capable of providing, as well as any technically feasible customized routing functions. Order in ICC Docket No. 01-0662 at ¶¶ 1916-1920. All this must be offered in a manner that permits a competing carrier to offer, and bill for, exchange access and the termination of local traffic. Further, BOCs must make available trunk ports on a shared basis and routing tables resident in the BOC's switch, as needed to provide access to shared transport functionality. Finally, a BOC may not limit the ability of competitors to use unbundled local switching ("ULS") to provide exchange access by requiring competing carriers to purchase a dedicated trunk from an IXC's point of presence to a dedicated trunk port on the local switch.

Under federal law, ILECs must offer unbundled access to local circuit switching, except for switching used to serve end users with four or more lines in access density zone 1 (the densest areas) in the top 50 Metropolitan Statistical Areas (MSAs), provided that the ILEC provides non-discriminatory, cost-based access to the enhanced extended link (EEL), this latter provision referred to as the "switch carve-out".

#### **B. The State Perspective**

The ICC has, in its *State UNE Order* (Order in ICC Docket No. 01-0614) determined that ILECs subject to 220 ILCS 5/13-801 of the Illinois PUA must offer unbundled access to local circuit switching even in the areas contained in the switch carve out exemption mentioned above.

#### **C. SBC Illinois' Demonstration of Compliance**

SBC asserted that it satisfied Checklist Item 6 by offering - pursuant to binding interconnection agreements - ULS that includes all the same features and functions that are available to its own retail operations. SBC averred that the *State UNE Order's* elimination of the switch carve-out is not relevant for Section 271 purposes. Nonetheless, the company has not attempted to invoke the switch carve-out, and so there is no issue regarding its compliance with the *State UNE Order*.

A "secure" switch feature is a capability that the manufacturer places in the switch, behind a password-protected security device that prevents purchasers (LECs) from using that feature unless they agree to pay for the feature software license. SBC makes these features available to CLECs pursuant to a BFR process, which has been approved by the ICC, and is similar to processes approved for Section 271 purposes. SBC contended that compatibility issues between secure features do exist. It further states that costs associated with secure features are not included in SBC switching cost models, so SBC does not double-recover those costs.

Remote Access to Call Forwarding ("RACF") allows customers to dial into a special telephone number to activate, deactivate or change the call-forwarding functionality offered as a vertical feature. SBC offered RACF to end users prior

to December 18, 2000, grandfathering it because of fraudulent use of the service. SBC nonetheless agreed to make RACF available to CLECs pursuant to a BFR process. SBC indicated that Z-Tel may have confused RACF with RCF, a different feature resident in a remote central office switch. RCF is a permanent call forwarding functionality that is provisioned by placing a translation against a telephone number in another central office switch, which then forwards all calls made to that number to the end user's local telephone number. RCF is separately available to CLECs.

SBC provides CLECs using Unbundled Local Switching with Daily Usage File showing per-call billing information for each line-side ULS port.

"Customized routing" permits carriers to designate those outgoing trunks associated with unbundled switching provided by the incumbent, which will carry certain classes of traffic originating from the carriers' customers; this feature permits carriers to route calls to their own OS and directory assistance (DA) service. SBC does either using the Advanced Intelligent Network ("AIN") – the standard process – or through Line Class Codes, which can be requested by BFR. SBC argued that the only issue is whether it provides a special form of custom routing, described by WorldCom as custom routing on Feature Group D ("FGD"). This need only be provided where technically feasible, and where costs are recovered, which SBC equated with a BFR. SBC stated that (1) WorldCom had not filed a BFR; and (2) the process is not feasible with respect to 45% of SBC's switches.

#### **D. Parties' Positions, Arguments, and Evidence**

WorldCom stated that it has instructed SBC for some years on its preferred mode of routing OS/DA calls to its own platform or to third party OS/DA platforms, but that SBC had refused to implement WorldCom's preferred OS/DA customized routing method. WorldCom could provide OS/DA to its customers by purchasing it from SBC, or by providing it itself. Either way, WorldCom relies upon SBC to route UNE-P customers' calls to WorldCom OD/DA facilities. WorldCom asserted that SBC fails to provide customized routing necessary to meet both WorldCom's business needs and FCC rules, even though technically feasible. Accordingly, SBC must provide OS/DA as UNEs – at TELRIC-based prices – until it complies with its customized routing obligations. WorldCom contended that, as a matter of law, no CLEC is required to utilize a BFR process to obtain a UNE, including custom routing. WorldCom further argued that its custom routing proposal is technically feasible, and that it has submitted information and documentation from the switch vendor to demonstrate this. SBC asserted that its ULS tariffs comply with the ICC's *TELRIC 2000 Order*, and consequently any assertion that it was not in compliance in the passed should be rejected. SBC further asserted that WorldCom expects it to develop and test a custom routing application without advance payment and without a promise from WorldCom's that it will purchase the capability so that SBC can recover these

costs, a result which SBC suggests is contrary to law, and in any case technically infeasible with respect to SBC's Nortel switches.

Z-Tel averred that SBC placed restrictions on ULS that prevent Z-Tel from using ULS to terminate, *inter alia*, intraLATA toll calls, a restriction that is an unlawful checklist violation and a violation state law. Further, SBC refused to provide RCF when Z-Tel places a UNE-P order to migrate a customer's service, which Z-Tel contends is a hardship for small business customers, since RCF permits such businesses to use the same phone number after relocating. However, RCF cannot and will not automatically "migrate" when a CLEC assumes a customer using the UNE-P, because it is not associated with the end user's switch port. Further, SBC contended that its tariff filed pursuant to the *State UNE Order* expressly allows CLECs to use ULS-ST for intraLATA toll. Thus, Z-Tel's assertion to the contrary is wrong, and irrelevant in light of the fact that this is a state law obligation. SBC provides CLECs nondiscriminatory access to secure switch features through the BFR process, and Staff has stipulated that the BFR process is appropriate.

Staff alleged that the BFR process SBC uses to provision secure features may not result in nondiscriminatory provision of secure features to CLECs -- provisioning intervals at parity with those SBC would experience when provisioning such features for itself. Staff stated that the BFR process might lead to double recovery of the costs involved in provisioning secure features active on some switches but not on others. Staff believed that concerns regarding the BFR process can be addressed through increased monitoring of the process. Staff and SBC stipulated that SBC will tariff the BFR process in a manner that will require SBC to notify the ICC regarding the completion of certain events in a BFR.

AT&T contended that SBC's tariff filed in purported compliance with the *State UNE Order* is defective inasmuch as it offers only those switch features and functionalities available to SBC end users, as opposed to all features and functionalities the switch is capable of providing, as required by federal law.

## **E. Performance Data Review**

SBC stated that its commercial performance results confirm that it provides CLECs nondiscriminatory access to ULS in accordance with the requirements of Checklist Item 6. No CLEC raised any Phase II issues. Staff stated that, while there was insufficient data to determine whether SBC's provisioning process for stand-alone unbundled local switching was satisfactory, there was no evidence to suggest that SBC's provisioning process impairs or impedes CLECs' ability to compete using this product. Staff agreed that SBC's reported performance relative to Checklist Item 6 was satisfactory.

## **F. ICC Findings and Recommendation – Checklist Item 6**

Based upon the stipulation with Staff, SBC's BFR process was found satisfactory with respect to the secure features issue. AT&T's challenge to SBC's tariff in compliance with the *State UNE Order* was not found to be properly before the ICC. SBC was required to make a showing of the steps and timeframes by which it is implementing its RACF commitment in Phase II, along with the RCF and *TELRIC 2000 Order* issues. WorldCom's custom routing arguments were rejected generally. SBC published an Accessible Letter stating at which central offices RACF is available, and making it available at those locations; it further stated it has updated that information. Further, where RCAF is not available, SBC will attempt to provide it subject to the BFR process. SBC stated that it makes RCF available as a resale offering. While SBC has been attempting to make this feature available where customers migrate to UNE-P, this presents significant technical issues that have not yet been resolved, despite SBC trying several different technical solutions. SBC and Staff have entered into a stipulation indicating that SBC had complied with ULS-ST pricing requirements of the *TELRIC 2000 Order*. Z-Tel stated that SBC may be correct in asserting that it filed tariff revisions to include an RACF offering, but stated there was no actual evidence that the product was offered.

SBC's commercial performance results with respect to unbundled local switching demonstrated that it is providing CLECs nondiscriminatory access to ULS, and no party contested SBC Illinois' performance. This showing, taken together with all the other evidence on record in Docket No. 01-0662, led the ICC to find that SBC Illinois satisfied the requirements of Checklist Item 6.

## **CHECKLIST ITEM 7 -- 911, E911 DIRECTORY ASSISTANCE, and OPERATOR CALLS.**

### **A. Standards for Review**

Section 271(c)(2)(B)(vii) of the Act, requires a BOC to provide nondiscriminatory access to: (I) 911 and E911 services; (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services. 47 U.S.C. § 271(c)(2)(B)(vii).<sup>119</sup> The FCC has determined that "section 271 requires a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, i.e., at parity."<sup>120</sup> Specifically, a BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it

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<sup>119</sup> The positions and arguments of the parties with respect to Checklist Item 10 (reciprocal compensation), as well as our analysis and conclusions, are contained in our Final Order at paragraphs 2001 -- 2107.

<sup>120</sup> *Ameritech Michigan Order*, ¶ 256.

maintains the database entries for its own customers.”<sup>121</sup> For facilities-based carriers, the BOC must provide “unbundled access to [its] 911 database and 911 interconnection, including the provision of dedicated trunks from the requesting carrier’s switching facilities to the 911 control office at parity with what [the BOC] provides to itself.”<sup>122</sup> The provisions of Section 271(c)(2)(B)(vii)(II) and (III) require a BOC to provide nondiscriminatory access to “directory assistance services to allow the other carrier’s customers to obtain telephone numbers” and “operator call completion services,” respectively. Section 251(b)(3) of the Act imposes on each LEC “the duty to permit all [competing providers of telephone exchange service and telephone toll service] to have nondiscriminatory access to . . . operator services, directory assistance, and directory listing, with no unreasonable dialing delays.” 47 U.S.C. Sec. 251 (b)(3). In the Second BellSouth Louisiana Order, the FCC concluded that a BOC must be in compliance with the regulations implementing section 251(b)(3) in order to satisfy the requirements of sections 271(c)(2)(B)(vii)(II) and (III).

The FCC specifically held that the phrase “nondiscriminatory access to operator services” means that “a telephone service customer, regardless of the identity of his or her local telephone service provider, must be able to connect to a local operator by dialing ‘0,’ or ‘0 plus’ the desired telephone number.” Competing carriers may provide operator services and directory assistance by: (i) reselling the BOC’s services, (ii) outsourcing service provision to a third-party provider, or (ii) using their own personnel and facilities. Competing carriers wishing to provide operator services or directory assistance using their own or a third party provider’s facilities and personnel must be able to obtain directory listings either by obtaining directory information on a “read only” or “per dip” basis from the BOC’s directory assistance database, or by creating their own directory assistance database by obtaining the subscriber listing information in the BOC’s database. Although the FCC originally concluded that BOCs must provide directory assistance and operator services on an unbundled basis pursuant to sections 251 and 252, the FCC removed directory assistance and operator services from the list of required UNEs in the UNE Remand Order.

Checklist item obligations that do not fall within a BOC’s obligations under section 251(c)(3) are not subject to the requirements of sections 251 and 252 that rates be based on forward-looking economic costs. Checklist item obligations that do not fall within a BOC’s UNE obligations, however, still must be provided in accordance with sections 201(b) and 202(a), which require that rates and conditions be just and reasonable, and not unreasonably discriminatory.

Operator services are any automatic or live assistance to a consumer to arrange for billing or completion of a telephone call. Directory assistance is a service that allows subscribers to retrieve telephone numbers of other subscribers. Incumbent LECs, however, remain obligated under the non-discrimination requirements of section 251(b)(3) to comply with the reasonable

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<sup>121</sup> Id.

<sup>122</sup> Id.

request of a carrier that purchases the incumbents' OS/DA services to rebrand or unbrand those services, and to provide directory assistance listings and updates in daily electronic batch files. In its Order for Docket No. 98-0396 (October 16, 2001) the Commission required SBC to provide OS/DA at TELRIC prices until SBC demonstrated that it could route OS/DA calls to CLEC networks.

## **B. The State Perspective**

In its Order in Docket No. 98-0396 (October 16, 2001) the Commission required SBC to provide OS/DA at TELRIC prices until it demonstrated that it could route OS/DA calls to CLEC networks.

## **C. SBC Illinois' Demonstration of Compliance**

According to SBC, a tariff provides 911 Service to private and Public Safety Agencies. The service enables a caller to reach a Public Safety Answering Point ("PSAP") by dialing the familiar digits 9-1-1. Enhanced 911 Service, SBC explained, uses a switch to route 911 calls to a particular PSAP designated by the Public Safety Agency based on the end user's telephone number. The E911 system, as described by SBC, includes the Automatic Number Identification ("ANI") Control Equipment, the Automatic Location Identification ("ALI") multiplexer, and other station equipment, which are located at the PSAP premises. The Public Safety Agencies determine whether the PSAPs will receive the ANI (telephone number) and ALI (name and address) with the 911 call.

No party to this proceeding, SBC asserted, challenged the evidence showing that SBC complies with its obligations to provide CLECs with nondiscriminatory access to 911 and E911 Services and, therefore, it contended the Commission should find that SBC had satisfied Checklist item 7(1). First, according to SBC, resale CLECs can provide 911 and E911 Service to their customers in the same manner as SBC provides such services to its own customers. End user records for resale customers are included in the same files that SBC uploads for its own customers. If SBC's error file identifies an error for a resale customer record, SBC employees (or employees of SBC's 911 Database Services Provider, Intrado) will correct the errors that can be resolved by issuing a service order.

Second, SBC asserted that it provides facilities-based CLECs nondiscriminatory access to 911 and E911 service through dedicated trunks from their facilities to the 911 Control Office. Dedicated 911 implementation managers facilitate CLEC interconnection and the testing and turn-up of a CLEC's 911 trunk(s) at the 911 Control Office. Upon installation, SBC and the CLEC jointly

conduct continuity testing to ensure that the trunks are functioning properly, using the same tests that SBC performs when it installs new 911 trunks from its own end offices to its 911 Control Offices.

Third, SBC noted that it provides CLECs with access to the MSAG database containing the necessary street address information for the exchanges or communities in which the CLECs operate, so CLECs can create the necessary end user files for the ALI. There is a single mechanized MSAG that is under the control of the 911 customer (the municipality) and used by all service providers interconnecting with the 911 systems provided by SBC. CLECs may view a copy of the MSAG electronically via a product called TCView, and can periodically obtain their own mechanized copy of the MSAG.

SBC maintained that it provides CLECs with nondiscriminatory access to Operator Services (“OS”) and Directory Assistance (“DA”) pursuant to legally binding agreements. More specifically, it provides OS, including Automated Call Completion (which allows an end user to complete a call without the assistance of an operator); Manual Call Assistance (in which an end user dials “0” or “0” plus an area code and telephone number in order to place a collect, third number, calling card or “sent paid” call using an operator’s assistance); Busy Line Verification (“BLV”) (a service whereby a caller may request that an operator check an access line to determine if the line is busy or is “off the hook”), Busy Line Verification Interrupt (“BLVI”) (which allows the end user to request that the operator interrupt a conversation in progress to ask whether one of the parties is willing to speak to the caller requesting the interrupt), and Operator Transfer Service (which allows a subscriber to request that an operator transfer a call to an interexchange carrier). SBC further asserted that it provides CLEC subscribers with the same DA services as provided to SBC subscribers. SBC claimed that the parties did not dispute its provision of nondiscriminatory access to OS and DA. The WorldCom complaint, it noted, deals with pricing.

SBC asserted that it provides directory assistance listing information in bulk format with daily updates so that CLECs can provide their own DA services. Appendix DAL of SBC’s interconnection agreements provides CLECs and their agents with access to all of the DA listings in SBC’s database.

In response to WorldCom’s contention that SBC is required to provide DAL in bulk with daily updates at TELRIC rates, SBC pointed out that the FCC has expressly excluded DA listing updates from its unbundling requirements.<sup>123</sup>

In response to WorldCom’s assertions that it continually experiences “unmatched deletes” --a phenomenon that occurs when the SBC daily update file shows that a listing was deleted but WorldCom cannot find the listing in its database-- the evidence shows, SBC argued, that WorldCom itself was the source of the unmatched delete problem. SBC Illinois contended that it investigated each of the instances provided by WorldCom, and found that each

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<sup>123</sup> UNE Remand Order at para 444.

deleted listing did match a listing that WorldCom had previously received, such that there were no unmatched deletes at all.

In short, SBC asserted that it strives for accuracy in its DA database, but perfection is not always possible or required. Parity is required, however, and SBC contended that it provides updates, upgrades, and any changes to the DA database to WorldCom on the same basis as SBC provides to itself in accordance with the Act.

#### **D. Parties' Positions, Arguments and Evidence**

WorldCom contended that, consistent with FCC and Commission requirements, SBC must provide OS/DA as a UNE at TELRIC rates, unless and until it successfully implements WorldCom's preferred customized routing solution (that would allow WorldCom's UNE-P OS/DA calls to be routed to WorldCom's OS/DA platforms or the OS/DA platforms of a third party provider). WorldCom asserted that this Commission has already set the conditions for SBC with respect to customized routing and OS/DA services in its Order in Docket No. 98-0396, dated October 16, 2001. WorldCom contended that SBC failed to acknowledge this requirement in this proceeding.

Staff concluded that: "Based on the information provided by Ameritech in its Affidavits in this docket, and information otherwise available to Staff, SBC appears to be in compliance with the 9-1-1 related requirements for this competitive checklist item." According to Staff, SBC also allows CLECs serving customers by use of SBC facilities to route OS/DA traffic to a third party platform via customized routing. Staff further contended that SBC demonstrated that it has provided branding and routing of OS/DA services in a nondiscriminatory manner.

The only issue raised on brief, SBC observed, is WorldCom's contention that SBC must offer OS and DA at TELRIC-based rates because it has not provided WorldCom with its preferred form of customized routing. This contention concerning customized routing was, in SBC's view, without merit. And in any event, SBC asserted, it does offer OS and DA at TELRIC-based rates, in accordance with the ICC's TELRIC Compliance Order.

SBC asserted that it is not obligated to provide "bulk" DA listings at TELRIC-based rates. According to SBC, WorldCom had provided no legal authority for its assertion that DA listings updates are a UNE. Indeed, SBC asserted, WorldCom ignored the FCC's UNE Remand Order (para. 444), which expressly excludes DA listing from the unbundling requirements, and thus from the TELRIC regime.

#### **E. Performance Data Review**

SBC stated that the September – November 2002 performance results show that it provides CLECs nondiscriminatory access to its 911 database. For every month in the study period, SBC cleared errors in the 911 database for CLECs faster than it did for its own 911 entries. According to SBC, the average time to process corrections was 8.56 hours for CLEC records, compared to 16.56 hours for retail.

With respect to the average time to process 911 updates for CLECs, SBC noted that although it missed the parity standard (PM 104) by 10-24 minutes, it still processed every CLEC update within the 24-hour standard established by the National Emergency Number Association. On average, SBC updated the 911 database for CLECs in just under 1.5 hours in September and November, and in just under 2 hours in October.

SBC stated that it surpassed the benchmark for average speed of answer for OS and DA calls, in every month. SBC's commercial performance results show that over 98 percent of electronic DA database updates flowed through without manual intervention, on average, over the study period.

No CLEC raised any issues in Phase II with respect to 911 and E911; nor did any CLEC raise any issues in Phase II specific to directory assistance or operator services.

Within the 6 performance measures for OS/DA (PMs 80, 82, 110, 111, 112, and 113), there are a total of 8 sub-measures. SBC data reflects that the company passed 6 and failed 2 of the sub-measures.

Data on PMs 102 (Average time to clear errors during the processing of the 911 database (UNE loop and port combination orders)), 103 (Percent accuracy for 911 database (facilities based carriers)), and 104 (Average Time Required to Update 911 Database (facilities based carrier)), relative to 911 and e-911, indicates that SBC passed PM 102 and failed PM 104. For PM 103, there was insufficient data for all sub-measures to make a determination. With respect to PM 104, it appeared to the Staff that SBC was unable to meet the parity standard for average time to update the 9-1-1 database and to unlock the 9-1-1 database records. Based on information available to Staff on the company's web site, SBC's inability to achieve parity for this performance measure on a consistent basis has persisted since at least January of 2002.

According to SBC's evidence, CLEC files had an 18.7% error rate in September and November 2002 versus a 7.3% error rate for SBC for the same time period. It appeared that SBC can, and perhaps should, work with the CLECs to identify ways the CLECs might reduce the number of errors in their files. SBC did not provide any information as to any steps they had taken to help rectify the problem.

The second factor that supposedly contributed to SBC not being able to achieve parity for PM 104 was that CLECs provided four times more files to

update than SBC, which resulted in longer average processing times. Staff considered SBC's explanation in this regard as insufficient given its belief that the average delays for SBC and the CLECs should be the same, even if there are more CLEC files to update.

It was Staff's view that SBC's reported performance relative to checklist item 7 is unsatisfactory given that Staff considered any failure relative to 911 service as unacceptable. In short, Staff was concerned about SBC's inability to update its directory assistance database.

Staff believed that SBC has the ability to meet this PM and has demonstrated so in the past. In Staff's view, SBC had not adequately explained how it is meeting the parity standard for PM 104 and could not verify that it is providing non-discriminatory access to CLECs. Although meeting the National Emergency Number Association (NENA) standards (by processing updates to the 9-1-1 database within 24 hours) addresses Staff's public safety concerns, it does not indicate whether SBC is providing non-discriminatory access to 9-1-1. Therefore, in Staff's opinion, SBC has failed to demonstrate that it is providing non-discriminatory access to 9-1-1 services.

Staff recommended that the Commission elect and impose one of the following conditions as a prerequisite to any determination that SBC is providing non-discriminatory access to 9-1-1 services:

1. SBC should present a reasonable plan to address its failure to consistently update CLEC 9-1-1 database files at the parity standard currently established, and commit to implement that plan in a timely manner; or
2. If the ICC does not find that SBC should be required to achieve parity under the current performance measure standard for Section 271 purposes, then SBC should pursue an alternative standard for the updating of 9-1-1 database files and commit to adopt such measure and standard as an additional performance measure and standard pending the next six month collaborative.
3. If the ICC accepts SBC's position that it should not be held to the existing standard, then a reasonable and workable standard is required so that timely updating of 9-1-1 database files on a non-discriminatory basis that the ICC can monitor.

In response to Staff's inquiry regarding the steps SBC has taken to address the causes of the higher CLEC error rate, SBC stated that it has four processes in place to assist CLECs in identifying and correcting errors in their 911 update submissions. Within 24 hours of the receipt of a CLEC 911 update file, SBC returns a "confirmation file" that includes information regarding the number of errors and an English-language explanation of the errors. Various experts are also available to assist CLECs with the resolution of errors, including SBC employees who proactively review the accuracy of CLEC 911 updates and

contact CLECs to discuss the resolution of errors. CLECs also have online access to the Master Street Address Guide, which allows them to reduce the potential for errors by submitting 911 updates using the most current street address information available.

In response to Staff's assertion that SBC "failed" PM 104.1, which measures the average time required to "unlock" or release 911 records to a facilities-based CLEC when that CLEC obtains the related customer, SBC stated that the measure is used for diagnostic purposes, and does not have a benchmark. SBC stated that Staff has thus, mistakenly labeled PM 104.1 a "miss."

#### **F. ICC Findings and Recommendation – Checklist Item 7**

Checklist Item 7, in part, requires SBC to provide nondiscriminatory access to 911 and E911 services. The ICC reviewed the Company's showing and concluded that SBC is in compliance with this requirement. There is no contrary view or evidence on record.

Another element of Checklist Item 7 is the obligatory provisioning of non-discriminatory directory assistance services. WorldCom contended that SBC did not "acknowledge" its need to comply with this Commission's Order in 98-0396. That Order, it argued, requires SBC to provide OS/DA as UNEs and at TELRIC rates until such time as it provides customized routing. The ICC noted SBC's assertion that it does offer OS and DA at TELRIC-based rates via the tariff it filed in compliance with the ICC Order, and WorldCom had not shown otherwise. So too, WorldCom's bulk DA listing at TELRIC pricing issue was not supported by any authority and, indeed, was contrary to the "standards for review" the ICC set out for this section. According to Staff, SBC met the customized routing requirement by offering this capability in two forms. Based on its review, the ICC indicated that SBC provides branding and routing of OS/DA in a non-discriminatory manner, thus fulfilling its Checklist Item 7 obligations.

Finally, Checklist Item 7 requires non-discriminatory access to operator services. SBC maintained that it satisfies this obligation pursuant to legally binding agreements and specifically detailed the components provided. The ICC was shown nothing to preclude a finding that the Company satisfies this element of Checklist Item 7.

SBC's commercial performance results show that SBC clears 911 database errors faster for CLECs than for its own retail operations. While SBC did not update 911 entries for CLECs quite as quickly as it did its own entries, the ICC accepted SBC's explanation (two separate outside factors) for the minor shortfall, and further noted that no CLEC has shown that the shortfall had any competitive impact. The Commission concluded that SBC satisfies the requirements of checklist item 7 with respect to 911 and E911.

Apart from being a matter of Section 271 compliance, the ICC recognized that an efficient 9-1-1 emergency response system is vital to public safety. Indeed, the Illinois General Assembly charged the ICC with establishing technical standards for 9-1-1 systems. The ICC thus reviewed and considered SBC's compliance in light of these concerns. The ICC agreed that SBC's processing of CLEC 911 updates meets public health and safety concerns, on the showing that SBC processes such updates well within the 24-hour standard established by the National Emergency Number Association. This, however, is not near to being reflected as the current standard for PM 104.

As such, the ICC took account of Staff's recommendations and required that SBC commit to pursuing and exploring, together with Staff and the CLECs, a more reasonable and workable standard for the updating of 9-1-1 database files in the next upcoming six month collaborative. Upon the ICC's approval and the implementation of such standard, Staff will monitor and report on the results.

While the ICC concluded that SBC's commercial performance results demonstrate that it satisfies the requirements of this checklist item, the the ICC accepted, as reasonable, Staff's determination that the shortfalls in September and November 2002 for the average time to process CLEC update orders were isolated occurrences without competitive significance, given that the differences were slight and that SBC met the benchmark for every other month in 2002.

The ICC also noted that Staff and SBC agreed that the pricing issues for checklist item 7, raised in Phase I of this proceeding, had been resolved.<sup>124</sup> All in all, the ICC found SBC to meet the requirements and satisfy Checklist Item 7.

## **CHECKLIST ITEM 8 – WHITE PAGES.**

### **A. Standards for Review**

Section 271(c)(2)(B)(viii) of the 1996 Act requires SBC to provide “[w]hite pages directory listings for customers of the other carrier’s telephone exchange service.” 47 U.S.C. Section 271 (c)(2)(B)(viii). Section 251(b)(3) requires all LECs to permit competitive providers of telephone exchange service and telephone toll service to have nondiscriminatory access to directory listings. The FCC ruled that, consistent with its interpretation of “directory listing” as used in Section 251(b)(3), “white pages” as used in Checklist Item 8 refers to the alphabetical directory that includes the residential and business listings of the customers of the local exchange provider and includes, at a minimum, the subscriber's name, address, telephone number, or/and combination thereof. The FCC determined that a BOC can satisfy the requirements by demonstrating that it (1) provides nondiscriminatory appearance and integration of white pages directory listings to

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<sup>124</sup> See discussion of checklist item 2 at ¶ 876 of our Final Order.

CLECs' customers and (2) provides white pages listings for competitors' customers with the same accuracy and reliability that it provides its own customers. The FCC rejected arguments that a BOC did not meet this checklist item even though CLECs experienced problems with the BOC's processes for altering customer listings and incorporating changes into the white pages directory, but indicated that a systemic problem, involving a significant number of listings, would warrant a finding of noncompliance.

## **B. The State Perspective**

The ICC addressed the issue of white pages listing in Docket No. 95-0458 stating, "[t]he Commission believes that a standard directory listing is an essential and integral component of local service." Order at 70, Docket Nos. 95-0458 and 95-0531 (consol). (June 26, 1996).

## **C. SBC Illinois' Demonstration of Compliance**

SBC explained that its "white pages" are published by an affiliate of SBC known as SBC Advertising Services or "AAS." AAS integrates and publishes the primary listings of CLEC end users in the same directory (covering the relevant geographic area) as the listings of SBC's customers. Listings for all subscribers, whether served by a CLEC, SBC or independent telephone company, include the subscriber's name, address and telephone number. CLEC end users may obtain a primary white pages listing in the same manner as SBC provides for its own retail customers.

SBC maintained that it provides for the "nondiscriminatory appearance and integration" of CLEC customer listings. The size, font, and typeface of CLEC customer listings are identical to those of SBC customer listings. CLEC customer listings are integrated alphabetically into all the other listings, and are not separately identified in any way. SBC further contended that it provides white pages listings to CLEC customers "with the same accuracy and reliability that it provides its own customers." CLECs can submit their listing orders to AAS itself or via one of the two electronic OSS interfaces that SBC provides i.e., Enhanced LEX (a Graphical User Interface modeled on Southwestern Bell's LEX system) or Electronic Data Interchange ("EDI"). CLECs can also submit their directory listing orders through the SBC Customer Entry System ("ACES"), a transitional software package offered by AAS that some CLECs use in lieu of the AAS interface or the two interfaces offered by SBC.

During the annual delivery of directories, the SBC white pages directory is delivered to each subscriber of CLEC resale and UNE-P services in the same manner and at the same time as SBC's retail subscribers. Further, SBC has agreed to provide secondary delivery to subscribers of CLEC resale and UNE-P services on the same basis as SBC's own retail customers. Finally, SBC

contended, CLECs may request and negotiate arrangements with AAS for the delivery of white pages directories to their switched-based customers in the same manner and at the same time that the directories are delivered to SBC's retail customers.

SBC explained that CLECs who use an SBC switch to provide service can order a directory listing order at the same time they request local service; in fact, a service that uses an SBC switch automatically includes a directory listing. Before June 2001, SBC noted, CLECs who used their own switches to provide service submitted their white pages listing orders directly to AAS, because these CLECs did not purchase anything from SBC that included a directory listing. In June 2001, however, SBC implemented a single interface, that allows a CLEC, that use its own switch, to submit a directory listing order to SBC at the same time that the CLEC submits its unbundled loop order. SBC then passes the directory listing order to AAS.

According to SBC, its customer service records only contain the directory listings information that is retained from orders for directory listings made to SBC. CLECs who order a service like resale or UNE-P that includes a telephone number from SBC also receive a directory listing, so the customer service record will include directory listing information. A resale/UNE-P CLEC, SBC explained, can thus obtain that customer service record, which includes listing information, through SBC's pre-ordering interface.

A switch-based CLEC, on the other hand, does not order any product that includes a directory listing. Rather, SBC explained, the directory listing is a separate service that the CLEC receives from AAS. While the single interface allows switch-based CLECs to submit a directory listing order over the SBC interface, SBC merely hands the listing order to AAS. Because the listing comes from AAS, it does not reside in SBC's customer service records.

SBC explained that TCListLink is an AAS website that allows CLECs and SBC alike to review and verify their end user's white pages listing data. The information in TCListLink, it contended, is generally updated within 24 hours of the submission of a listing order, such that in most cases CLECs are able to verify their listing the next business day after it is submitted.

#### **D. Parties' Positions, Arguments and Evidence**

According to XO, many of the directory listing problems that it experiences stem from the fact that there is no notification from SBC AAS when an XO order does not process correctly within AAS' internal systems. XO asserted that it should be notified when the ACES system rejects a directory listing order. The evidence shows, XO claimed, that it was not receiving CLEC Reject Notification Forms when a problem, such as a duplicate listing, occurred. Successfully transmitting an order via ACES, XO maintained, does not guarantee that the

order will successfully update either the white pages database or that the white pages database will successfully update the Directory Assistance database. The lack of notification problem is compounded where an error in one listing, e.g., an abbreviation in a street address, cascades when a database query relies on the previous incorrect listing. Further, XO testified to discrepancies with SBC's databases, including TCLink, Directory Assistance, and white pages. Given the importance of Directory Assistance databases, XO concluded that prior to receiving 271 authority SBC should be required to ensure and demonstrate that its processes can accurately maintain and update its Directory Assistance and white pages databases.

In addition to the concerns expressed by XO, AT&T maintained that in the settlement of Docket No. 00-0592, SBC committed to "incorporate the functionalities of its OSS interface and SBC Advertising Services' EDI interface so that CLECs can use a single SBC interface for service orders for directory listing on or before June 2001."<sup>125</sup> According to AT&T, SBC has failed to live up to this commitment. In AT&T's view, SBC's directory listing ordering process discriminates against facilities based CLECs. If a CLEC directory order involves resale service or UNE-P services, AT&T contended, the CLEC integrates its directory listing order with the Local Service Request ("LSR") and SBC processes that order via one interface – i.e., all completion notice, rejects, etc. are sent by SBC to the CLEC electronically over the same EDI interface by which the CLEC sends its directory order. The same holds true for SBC's retail directory listing orders, which are processed the same as the CLEC UNE-P and resale orders. But, AT&T asserted, when a facilities-based CLEC places a directory order with SBC, all responses are provided from AAS via fax, phone, or email. By providing two separate and wholly unequal means by which CLECs place directory orders, AT&T argued, SBC is discriminating between CLECs based solely on the market-entry mechanism they choose to use to enter the local market.

SBC's process for allowing CLEC's "access" to directory listings is similarly discriminatory, AT&T contended. Once the order process is final and the CLEC has retained a new customer with a directory listing, the CLEC still needs access to SBC's listing database to assist customers with questions about the listings that were placed and to facilitate changes and updates to those listings. AT&T argued that SBC has provided no valid reason why directory-listing inquiries could not be provided over one interface for all CLEC and SBC requests. Indeed, it plans to provide just that in September 2002, at least according to its POR. SBC has informed the CLEC community that, as a result of the POR delay, this implementation date will slip to November 2002. AT&T asserted that SBC cannot be deemed to be providing nondiscriminatory access to directory listings unless and until SBC moves up this date.

According to Staff and based on the evidence presented, SBC appears to be in compliance with the white pages directory listing requirements of Checklist Item 8.

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<sup>125</sup> See Order at 98-99, Docket 00-0592, (January 24, 2001).

In response to the complaints of XO and AT&T, SBC maintained that CLEC subscribers' listings are integrated into the white pages just like SBC's end user listings, and that CLEC subscribers receive the same white pages in the same way that SBC's end users do. SBC noted that Staff agrees that SBC "appears to be in compliance with the white pages directory listing requirements of Checklist Item 8." The few disputes related to Checklist Item #8, it observed, relate solely to procedures for submitting or obtaining listings, and do not affect checklist compliance. Specifically, SBC claimed that all concerns of XO have either been addressed or are groundless. As noted by Staff, SBC's testimony "addresses each example [of problems] provided by XO, and cites the steps and actions taken by [SBC] to remedy the problem." Further, "a significant portion of the problems experienced by XO were caused by XO's internal processes." According to SBC, AT&T's charge that a "second interface" is required concerns only the indisputably small percentage of orders for which AT&T receives a faxed error notice from AAS after the initial submission and edit of a request. As for AT&T's claim regarding pre-order inquiries, SBC asserted that AT&T has not shown the use of an AAS interface for pre-ordering to have any competitive significance. Nor does AT&T dispute that this difference stems solely from the fact that switch-based CLECs do not order any product from SBC that includes a directory listing, such that CLECs' listing information does not reside in SBC's customer service records.

#### **E. Performance Data Review**

Only one performance measure related to Checklist Item 8, PM CLECW14, which yielded insufficient data during the review period to produce any measurable result. Staff concluded however that SBC's reported performance relative to checklist item 8 is satisfactory.

#### **F. ICC Findings and Recommendation – Checklist Item 8**

Staff told the ICC that SBC is in compliance with the requirements of Checklist Item 8. The ICC observed that SBC has adequately addressed, corrected or responded to the few issues raised on the matter at hand. Since no dispute was raised with respect to performance results for Checklist Item 8, the ICC concluded that SBC satisfies the requirements of Checklist Item 8. No remedial actions were required of the Company.

### **CHECKLIST ITEM 9-NUMBERING ADMINISTRATION.**

#### **A. Standards for Review**

Section 271(c)(2)(B)(ix) of the 1996 Act requires a 271 applicant to provide: “nondiscriminatory access to telephone numbers for assignment to the other carrier’s telephone exchange service customers,” until “the date by which telecommunications numbering administration, guidelines, plan, or rules are established.” 47 U.S.C. 271(c)(2)(B)(ix). This checklist Item mandates compliance with “such guidelines, plan, or rules” after they have been established.<sup>126</sup>

## **B. SBC Illinois’ Demonstration of Compliance**

SBC asserted that there is no dispute as to whether it has satisfied Checklist Item 9. Before March 29, 1999, SBC recalled, it served as the Code Administrator for the State of Illinois. In that capacity, it satisfied the requirements of Checklist Item 9 by providing nondiscriminatory access to telephone numbers to all requesting carriers. SBC followed the applicable industry standards, the CO Code Assignment Guidelines and the NPA Code Relief Planning Guidelines, in providing access to telephone numbers. Pursuant to those guidelines, SBC assigned 934 NXX codes (representing 9.34 million telephone numbers) to 23 different CLECs in Illinois.

On March 29, 1999, NeuStar (formerly Lockheed Martin) assumed central office code administration responsibilities in Illinois (and since that time SBC has had no responsibility for number administration). As such, SBC contended, March 29, 1999, is the “date [on] which telecommunications numbering administration guidelines, plan, or rules are established” under Section 271(c)(2)(B)(ix) of the 1996 Act. Rather than show that it provides nondiscriminatory access (because it is no longer responsible for providing access), SBC contended that it must show that it “adheres to the industry’s CO administration guidelines and Commission rules, including those sections requiring the accurate reporting of data to the CO code administration [NeuStar].”<sup>127</sup>

SBC asserted that there is no dispute but that it adheres to all number administration industry guidelines and applicable rules. Also, while SBC no longer acts as Code Administrator, it still translates competing providers’ NXX codes into its network to facilitate call completion (so its switches will know how to route calls to those NXX codes). In translating new NXX codes, SBC treats all new codes identically, and uses the same process and timeline, regardless of whether the code is assigned to SBC or a CLEC. SBC also adheres to the CO Code Assignment Guidelines to manage the translation process.

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<sup>126</sup> The positions and arguments of the parties with respect to Checklist Item 9 (Numbering Administration), as well as our analysis and conclusions, are contained in our Final Order at paragraphs 2171 -- 2193.

<sup>127</sup> Second Louisiana 271 Order, para. 265.

### **C. Performance Data Review**

In the Phase II proceeding SBC stated that the three PMs (117, 118, and 119), relevant to checklist item 9, demonstrate that SBC provides nondiscriminatory access to telephone numbers. Sixty-eight NXXs were assigned to CLECs during the three month study period, and SBC loaded all of those NXXs into its switches, and tested each NXX, before the effective date. Further, CLECs issued only a single trouble report in October 2002, and two trouble reports in November 2002. The October trouble report was cleared in 0.03 days – faster than SBC’s own retail repair interval. And while the average repair interval in November was 0.08 days (slightly higher than the retail average of 0.05 days), SBC stated that the difference was insignificant, especially given the low rate of troubles. Furthermore, no CLEC addressed checklist item 9 in Phase II.

For all 3 months the official PM result for all three measures is, according to Staff, “n/a,” due to the nature of the performance measure. That said, Staff concluded that SBC’s reported performance relative to checklist item 9, is satisfactory.

### **D. ICC Findings and Recommendation – Checklist Item 9**

The ICC found SBC to have demonstrated that it adheres to all pertinent rules and requirements governing Checklist Item 9. There was no dispute or showing to the contrary. The ICC concluded that SBC’s commercial performance results further demonstrate that SBC satisfies the requirements of checklist item 9.

## **CHECKLIST ITEM 10 – NONDISCRIMINATORY ACCESS TO DATABASES AND ASSOCIATED SIGNALING NECESSARY FOR CALL ROUTING AND COMPLETION.**

### **A. Standards for Review**

Section 271(c)(2)(B)(x) of the 1996 Act requires a 271 applicant to provide “nondiscriminatory access to databases and associated signaling necessary for call routing and completion.” 47 U.S.C. Section 271 (c)(2)(B)(x).<sup>128</sup> In the Second BellSouth Louisiana Order, the FCC required BellSouth to demonstrate that it

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<sup>128</sup> The positions and arguments of the parties with respect to Checklist Item 10 (reciprocal compensation), as well as our analysis and conclusions, are contained in our Final Order at paragraphs 2194 – 2304.

provided requesting carriers with nondiscriminatory access: (1) signaling networks; (2) certain call-related databases necessary for call routing and completion, or as an alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) service Management Systems (SMS).

In the Local Competition First Report and Order, the FCC defined “call-related databases” as databases, other than operations support systems, which are used in signaling networks for billing and collection or the transmission, routing, or other provision of telecommunications service. At that time, the FCC required incumbent LECs to provide unbundled access to their call-related databases, including but not limited to: the Line Information Database (LIDB), the Toll Free Calling database, the Local Number Portability database, and Advanced Intelligent Network databases.<sup>129</sup> In the UNE Remand Order the FCC clarified that the definition of call-related databases “includes, but is not limited to, the calling name (CNAM) database, as well as the 911 and E911 databases.”<sup>130</sup>

In Illinois, incumbent LECs must unbundle signaling links and signaling transfer points (STPs) in conjunction with unbundled switching, and on a stand-alone basis.<sup>131</sup> Incumbent LECs must also offer unbundled access to call-related databases, including, but not limited to, the Line Information database (LIDB), Toll Free Calling database, Number Portability database, Calling Name (CNAM) database, Operator Services/Directory Assistance databases, Advanced Intelligent Network (AIN) databases, and the AIN platform and architecture.<sup>132</sup>

## **B. SBC Illinois’ Demonstration of Compliance**

SBC stated that it maintains customer information and instructions for routing calls in several databases. It further maintained that no party disputed that it provides unbundled, nondiscriminatory access to its signaling networks, including signaling links and Signal Transfer Points. SBC provides a SS7 Interconnection Service, which allows CLECs to use its SS7 network for signaling between CLEC switches, between CLEC and SBC switches, and between CLEC switches and those of other parties connected to the SS7 network. This arrangement is identical to what SBC uses itself.

Where a CLEC obtains unbundled local switching, SBC provides “access [to signaling] from that switch in the same manner in which [SBC] obtains such access itself.”<sup>133</sup> Unbundled switching is provided on the same switches that SBC uses to provide service to its own end users, the Company contends, so all

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<sup>129</sup> (*Id.* at 15741-42, para. 484.)

<sup>130</sup> *Id.* at para. 403.

<sup>131</sup> Final Order, at Para. 2200.

<sup>132</sup> See also, Third Report and Order and Forth Further Notice of Proposed Rulemaking, In the Matter of Implementing of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, (Released November 24, 1999), 15 F.C.C. Rcd. 3696 at para. 419.

<sup>133</sup> 47 C.F.R. 51.319(e)(1)(i).

signaling functions are identical. Finally, SBC asserted that, in accordance with 47 C.F.R. 51.319(e)(1)(ii), it provides to a CLEC with its own switches “access to [SBC’s] signaling network for each of the requesting telecommunications carrier’s switches,” and this connection is “made in the same manner as an incumbent LEC connects one of its own switches to a signaling transfer point.” SBC provides access to its SS7 network through the Signaling Access Service. Access to the network, SBC explained, is provided by subscribing to a Dedicated Network Access Link and to a dedicated STP port for carriers with their own Signal Transfer Points.

SBC allows CLECs to access its 800 Database to support the processing of toll-free calls. The database is used to identify the appropriate 800 service provider to transport a toll-free call, and the appropriate routing for the call, based on the toll-free number. According to SBC, no party disputed that it provides nondiscriminatory access to the 800 Database.

SBC noted that while requiring ILECs to provide access to AIN databases, the FCC concluded that ILECs are not required to provide access to the proprietary service software that resides in those databases.<sup>134</sup> Instead, according to SBC, CLECs are entitled to use an ILEC’s Service Creation Environment (SCE: a computer used to design, create, test, and deploy new AIN-based services) to develop their own AIN-based services. SBC provides nondiscriminatory access to its AIN databases and access to its SCE, provided that appropriate security arrangements are made.

The Line Information Database (“LIDB”) is where local exchange carriers store information about their end users’ accounts. SBC no longer maintains its own LIDB. Rather, it contracts with Southern New England Telephone Diversified Group (“SNET DG”), which maintains a LIDB that SBC switches “query” in routing calls. Almost by definition, SBC explained, a CLEC that uses SBC’s switching (by resale or by unbundled access to switching) accesses the LIDB in the same way that SBC does, by using the same switch.

The Calling Name Database (“CNAM”), SBC contended, “contains the name of the customer associated with a particular telephone number and is used to provide Caller ID and related services.”<sup>135</sup> SBC provides all CLECs nondiscriminatory access to its CNAM database.

The Service Management System (“SMS”) that SBC uses to administer data in the LIDB and CNAM databases it informs is called Operator Services Marketing Order Processor (OSMOP). SBC provides CLECs access to OSMOP to input, change, and maintain their data in SBC’s CNAM database and in SNET DG’s LIDB database. According to the Company, CLECs can use the same two electronic interfaces that SBC uses, i.e., the Service Order Entry interface (which allows CLECs to send data directly to OSMOP) or the Interactive Interface (which

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<sup>134</sup> UNE Remand Order, para. 402.

<sup>135</sup> UNE Remand Order, para. 406.

is equivalent to the interface used by SBC's Database Administration Control personnel).

### **C. Parties' Positions, Arguments and Evidence**

Staff asserted that the ICC should direct SBC to work with RCN in a coordinated effort to resolve the problem with CNAM in as expeditious manner as possible, and report the results to the ICC. Even as the cause of RCN's problem was unclear, Staff maintained that SBC has met its burden by identifying a number of non-SBC related causes. Thus, Staff asserted that SBC should be found to be in compliance with Checklist Item 10.

Based on the FCC's UNE Remand Order, Staff asserted, there appears to be no basis for requiring SBC to provision Privacy Manager to requesting carriers.<sup>136</sup> Staff disagrees with the CLEC's position to the contrary. An ILEC is not required to unbundle Privacy Manager by either the FCC or the State of Illinois according to Staff.

Staff also asserted that the FCC has only placed requirements upon the ILEC in the manner in which it provides access to call-related databases, but it has not expressly limited the CLEC's access to a "per query" basis. Staff's analysis, it contended, demonstrates that SBC does not need to provide "batch" downloads to CLECs for it to provide nondiscriminatory access to CNAM.

According to AT&T, SBC is required to provide CLECs with the CNAM database as a UNE pursuant to the UNE Remand Order and to provide the CNAM database at TELRIC-based rates in accordance with the Section 252(d)(1) of the Act and the FCC's TELRIC methodology. AT&T noted that SBC's tariffed offering for the Calling Name (CNAM) database UNE was included in the same tariff investigated in Docket No. 00-0538. This tariff was withdrawn and refiled, and an investigation has not been initiated. As such, AT&T maintains, SBC's CNAM database rates have neither been investigated nor approved by the ICC.

AT&T noted Staff's testimony indicating that the SBC's rates for subloops, dark fiber and the CNAM database are higher than the rates for the same rate elements in SBC Michigan territory (which has a comparable rate structure) in 73% of the instances. Moreover, AT&T contended, CNAM rates are significantly higher in Illinois than they are in other states.

WorldCom contended that, while the FCC has determined that the DAL database is a UNE, SBC today does not offer DAL at TELRIC rates. According to WorldCom, the ability to receive the DAL database in a readily accessible format and at reasonable and nondiscriminatory prices is essential to its ability to

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<sup>136</sup> UNE Remand Order, para. 402.

compete in the directory assistance marketplace.<sup>137</sup> Until SBC first provides DAL to WorldCom (and other qualifying providers) at TELRIC rates, and in an acceptable manner, it will not satisfy Checklist Item 10. WorldCom urged the ICC to join with Georgia, Tennessee, Michigan and Minnesota and require the provision of CNAM information in batch download form, as well as on a per-query basis.

WorldCom also suggested that there is a flaw in the way that SBC provisions CNAM for WorldCom customers who are calling SBC customers, resulting in the display of incorrect information on caller ID with name units. While SBC will correct the wrong information as each wrong piece of data is noticed, WorldCom notes, there is no timetable for implementing a permanent solution to prevent incorrect information from being displayed.

According to WorldCom, SBC was limiting WorldCom's use of the LIDB to the provision of local service. Because LIDB is generally used to validate calling cards, collect calls and third party call information, however, this restriction is improper, given that it excludes these very uses of the LIDB. These LIDB restrictions are improper and anticompetitive, WorldCom contended.

RCN contended that SBC's CNAM database query rates are not TELRIC-based, and the Company failed to provide nondiscriminatory routing of third-party CNAM database queries. SBC's CNAM query rates, it claimed, are significantly higher than the CNAM query rate in other jurisdictions. In addition, SBC does not route RCN's third-party CNAM queries in the same manner in which SBC routes such queries for its own retail customers.

According to SBC, the Checklist Item 10 requirement of nondiscriminatory access to databases and associated signaling necessary for call routing and completion refers specifically to the signaling network that transmits data within the network, certain call-related databases necessary for call routing and completion, and the Service Management Systems (SMS) used to maintain the data.

No party disputed that SBC provides nondiscriminatory access to its signaling networks and to its Service Management Systems. So too, SBC contended, there is no dispute as to four of the six call-related databases identified by the FCC: the Toll Free Calling Database, the AIN, the 911 Database, and the E911 Database.<sup>138</sup> The only disputes under this Checklist Item, SBC noted, relate to the CNAM and the LIDB.

SBC is not, as WorldCom claims, "limiting WorldCom's use of the LIDB to those cases where WorldCom would use it for the provision of local service." Where WorldCom is providing long distance service, it may still access the LIDB;

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<sup>137</sup> See In the Matter of Provision of Directory Listing Information, First Report & Order, FCC 0127, January 2001, para. 1, 3, and 6 ("DAL Provisioning Order").

<sup>138</sup> 47 C.F.R. 51.319(e)(2)(i).

all it has to do is pay the applicable access charge. WorldCom may not access the LIDB as a UNE when it provides long distance service, SBC contends, because the FCC has held that long-distance providers cannot use unbundling to evade long-distance access charges.<sup>139</sup>

WorldCom's contention that SBC must provide bulk downloads of all the information in its CNAM database (as opposed to allowing CLECs to submit "queries" for individual calls the way SBC does) has been demonstrated to be wrong, the Company claimed. In the Verizon Virginia arbitration, SBC noted, WorldCom made the same arguments concerning bulk access that it makes here. The FCC held that "the Act and the Commission's rules do not entitle WorldCom to download a copy of Verizon's CNAM database or otherwise obtain a copy of that database from Verizon."<sup>140</sup> The FCC also rejected WorldCom's arguments that bulk downloads are required for "nondiscriminatory access."<sup>141</sup>

Regarding RCN's claim that SBC did not respond to its repeated attempts to resolve its problems, based on Staff's review, it is unclear that the problem was within SBC's control.

With respect to the issue of access to Privacy Manager, AT&T agrees with Staff that neither the FCC nor the state has required up to this point that this AIN service software to be unbundled. Believing that the ICC has the authority to require the unbundling of additional elements beyond the FCC's requirements, AT&T nevertheless contended that the issue concerning Privacy Manager should be taken up in further or future proceedings, rather than in this phase of the investigation.

Contrary to SBC's arguments, WorldCom maintained that it never said that the 1999 Directory Listing Order requires ILECs to provide bulk download access to the CNAM database. Rather, WorldCom noted that the CNAM database is "analogous" to that of the DAL database, since both databases contain nearly identical information and the rationale behind 1999 Directory Listing Order's reliance on FCC rule 51.311 in requiring ILECs to provide bulk downloads of the DAL database is equally persuasive in the CNAM context.

It is clear, WorldCom contended, that SBC itself has bulk access to the CNAM database, and that CLECs who are relegated to merely the per-query form of access cannot use the database nearly as economically, efficiently or effectively as SBC. WorldCom also contended that the FCC's recent order in the Virginia Arbitration between various CLECs (including WorldCom) and Verizon does not preclude the outcome a requirement that CNAM be provided in batch download format. WorldCom invited the ICC to take a progressive stance, and find on the basis of federal and state authority, as well as upon the record here developed, that it is appropriate to have SBC provide CLECs with batch

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<sup>139</sup> First Report and Order, para. 30.

<sup>140</sup> Verizon Virginia Arbitration, para. 524.

<sup>141</sup> Id. at para. 525-527.

download access to the CNAM database, in addition to its per-query CNAM access offering.

Staff recommended that the ICC condition its favorable recommendation to the FCC on SBC making a commitment to resolve the issue raised by RCN pertaining to transmission of a calling party's CNAM information. Staff also repeated that SBC must also file TELRIC compliant rates or demonstrate that the interim rates for the following are compliant with TELRIC principles: non-recurring charges for UNE combinations; non-recurring charges for UNEs; recurring UNE charges; unbundled switching and interim shared transport rates (ULS-IST); dark fiber; unbundled sub-loop rates; AIN routing of OS/DA charge; CNAM database access charge; NGDLC UNE platform charge; and OSS modification charge for the HFPL UNE.

#### **D. Performance Data Review**

There are no ICC-approved performance measures specific to checklist item 10. BearingPoint conducted a processes and procedures review of SBC's AIN and SS7 surveillance. BearingPoint concluded that SBC satisfied the relevant criteria by adequately monitoring AIN and SS7 interconnection activity and logging, categorizing, and tracking network alarms.

#### **E. ICC Findings and Recommendation – Checklist Item 10**

On record, WorldCom raised a dispute concerning its desire for batch or bulk CNAM v. per query access. The ICC's review showed that the FCC has rejected arguments asserting that bulk downloads are required for non-discriminatory access. The handful of state commissions that found otherwise, rendered their decisions prior to the FCC's pronouncement in the Verizon-Virginia Arbitration matter. WorldCom then asked the ICC to take a stance and order SBC to provide batch download access to the CNAM database. As such, it made clear that this was not a compliance issue and outside the scope of this investigation. In other words, WorldCom's admitted that this was outside the scope of this compliance investigation.

RCN also raised concerns regarding the routing of RCN's CNAM queries. While Staff believed SBC to have met its burden of proof with respect to the issue raised by RCN, it favored further action by the Company. To be specific, Staff recommended that SBC commit to working along with RCN to resolve the problems. The ICC agreed and accepted Staff's recommendation on the matter.

The ICC concluded in Phase I that SBC satisfied checklist item 10 on the condition that it report in Phase II on the measures taken to assist RCN in the identification and resolution of RCN's CNAM-related difficulties. SBC provided this information on January 22, 2003 – in its Phase I Compliance Affidavit, and

attached correspondence from RCN indicating that its CNAM problems have been resolved.

No CLEC pursued any aspect of checklist item 10 compliance in the subsequent Phase II proceeding. The ICC thus concluded, on the whole of the record, that SBC Illinois satisfies the requirements of checklist item 10.

## **CHECKLIST ITEM 11 – NUMBER PORTABILITY.**

### **A. Standards for Review**

Section 271(c)(2)(B) (xii) of the 1996 Act requires a 271 applicant to comply with the number portability regulations adopted by the Commission [“FCC”] pursuant to section 251. 47 U.S.C. Section 271(c)(2)(B)(xii).<sup>142</sup> Section 251(b)(2) requires all LECs to provide, “to the extent technically feasible, number portability in accordance with requirements prescribed” by the FCC.”<sup>143</sup> The Act defines number portability as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”<sup>144</sup> In order to prevent the cost of number portability from thwarting local competition, Congress enacted section 251(e)(2), which requires that “[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC].”<sup>145</sup>

Pursuant to these statutory provisions, the FCC requires LECs to offer interim number portability “to the extent technically feasible.” The FCC also requires LECs to gradually replace interim number portability with permanent number portability. The FCC has established guidelines for states to follow in mandating a competitively neutral cost-recovery mechanism for interim number portability, and created a competitively neutral cost-recovery mechanism for long-term number portability. On March 31, 1998, the end date mandated by the FCC for number portability implementation in the Chicago MSA, SBC Illinois implemented number portability. On April 8, 1998, the ICC approved SBC Illinois’ number portability tariff and it was allowed to go into effect.

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<sup>142</sup> The positions and arguments of the parties with respect to Checklist Item 11 (Number Portability), as well as our analysis and conclusions, are contained in our Final Order at paragraphs 2305 -- 2335.

<sup>143</sup> 47 U.S.C. Section 251(b)(2).

<sup>144</sup> *Id.* at 153(30).

<sup>145</sup> *Id.* at 251(e)(2).

## **B. The State Perspective**

As directed by the ICC, an Industry Working Group on number portability held a number of workshops during year 1995. On September 8, 1995, the Working Group reached consensus regarding the basic type of number portability to recommend to the Commission for implementation in Illinois. On February 20, 1996, Ameritech, GTE, Sprint, MCI, MFS, AT&T and TCG filed a Stipulation and Agreement seeking the Commission's adoption of the Location Routing Number (LRN) method for permanent number portability. This method, originally proposed by AT&T, was refined within the Illinois Number Portability Task Force meetings by the above seven companies as well as other industry participants. By Order, on March 13 1996, the Commission found that, "the Location Routing Number call model is reasonable and supported by the record for use as the long-term call processing model for implementation of local number portability" Order at 4 Docket 96-0089, (March 13, 1996). Illinois Bell Telephone Company; GTE North Incorporated; GTE South Incorporated; Central Telephone Company of Illinois, Inc.; AT&T Communications of Illinois; MCI Telecommunications Corporation; MCIMetro Transmission Service, Inc.; Sprint Communications Company L. P.; MFS Intelenet of Illinois, Inc.; Teleport Communications Group, Inc. Joint Petition For Approval of Stipulation and Agreement Relating to the Implementation of Local Number Portability).

On March 13, 1996, this Commission initiated Docket No. 96-0128 to discuss statewide implementation of local number portability. (Illinois Commerce Commission On Its Own Motion, Implementation of Local Number Portability, Docket 96-0128, (Dismissed November 7, 1996)). On July 2, 1996, the FCC released its First Report and Order in CC Docket 95-116 addressing number portability. This order adopted the same call model selection criteria used in Illinois to select LRN. The FCC also mandated that a Field Test be carried out in the Chicago MSA prior to implementation of number portability. The FCC's schedule for implementation set Chicago as one of the first areas to implement number portability (10/1/97).

Following the conclusion of the FCC mandated Field Test on September 26, 1997, the Task Force filed with the FCC and ICC a report detailing the results of the Field Test on October 17, 1997. The report indicated that no technical issues were identified that would prevent the deployment of number portability.

On March 31, 1998, the end date mandated by the FCC for number portability implementation in the Chicago MSA, Ameritech implemented number portability. On April 8, 1998, this Commission approved Ameritech Illinois' number portability tariff and it was allowed to go into effect.

## **C. SBC Illinois' Demonstration of Compliance**

SBC Illinois contended that it has deployed LNP in all of the required MSAs within its service area; in fact, by August 1999, SBC had deployed LNP in every switch in its operating territory, representing 100% of its access lines. SBC

also maintained that its deployment of LNP fully satisfies the myriad performance criteria and technical requirements established by the FCC.

SBC noted that telephone numbers for all carriers, including SBC, are maintained by a regional third-party Number Portability Administration Center (“NPAC”), i.e., Neustar. If a CLEC wants to “port” a number assigned to SBC, it initiates a number portability request by issuing a Local Service Request (“LSR”) to SBC. As with other LSRs, SBC explained, it processes the request and returns a firm order confirmation (“FOC”) to the requesting carrier. The requesting carrier must then input a “create message” to the regional administrator, indicating its intent to port a telephone number. SBC sends a matching message. The requesting carrier may then activate the ported number on the due date, and the LNP administrator broadcasts the number, along with the associated LNP routing information, to all LNP-capable service providers so they can properly route calls.

SBC maintained that it has binding interconnection agreements with CLECs that require parties to provide LNP in conformance with the Act and the FCC’s rules. Competing carriers, it noted, have ported over 864,000 numbers through September 2001. SBC observed that, in the Third Report and Order, the FCC established “an exclusively federal recovery mechanism for long-term number portability.” According to SBC, it has effective tariffs for a monthly number-portability charge and a query-service charge. The Company asserted that these tariffs comply with the relevant FCC orders.

#### **D. Parties’ Positions, Arguments, and Evidence**

There was no dispute raised regarding SBC satisfying Checklist Item 11. No party alleged that SBC fails to provide long-term number portability in accordance with FCC rules.

#### **E. Performance Data Review**

There was no dispute raised regarding SBC’s performance results for Checklist Item 11. A summary of SBC’s performance data related to Checklist Item 11 is provided below.

##### ***Summary of Performance Data Results***

SBC met or exceeded the applicable performance standard in at least two of the three months for 96.3 percent of the measurements associated with this checklist item. During the three months as a whole, SBC ported over 67,000 numbers, and achieved the following results: (i) SBC ported over 99 percent of numbers within intervals specified by industry guidelines, beating the 96.5 percent benchmark in each month; (ii) SBC ported numbers, on average, with

only 3.4 minutes out of service; and (iii) SBC maintained high quality, with only 2 lines (0.003 percent of the total provisioned) reporting trouble within 30 days of porting.

In the BearingPoint test, BearingPoint included LNP requests in the mix of test orders it submitted to SBC for processing, and it tested orders for LNP alone, for loops with and without LNP, and for EELs with and without LNP. BearingPoint found that SBC issued timely and accurate order confirmations for LNP and loop with LNP orders; “flowed through” 99.1 percent of LNP orders in accordance with published flow-through documentation; started work on all loop-with-LNP cutovers within 30 minutes of the scheduled cutover time, and completed provisioning of 99.3 percent of the cutovers within 60 minutes. BearingPoint also determined that only 3.3 percent of the 271 loop-with-LNP cutovers observed had trouble reported within 30 days of installation; that in porting numbers, SBC did not prematurely disconnect *any* switch translations prior to the scheduled conversion time; and that, consistent with industry guidelines, SBC applied the 10 digit trigger (a preliminary step to porting the number) on the day before the due date for 99.4 percent of the 360 LNP lines observed.

#### **F. ICC Findings and Recommendation – Checklist Item 11**

The ICC concluded that SBC satisfies the requirements of Checklist Item 11. The ICC also found that SBC’s commercial performance results and the results of OSS testing support the finding that SBC satisfies the requirements of checklist item 11. No party disputed this conclusion.

#### **CHECKLIST ITEM 12 – LOCAL DIALING PARITY.**

##### **A. Standards for Review**

Section 271(c)(2)(B)(xii) of the 1996 Act requires a 271 applicant to provide: “nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).”<sup>146</sup> Section 251(b)(3) imposes upon all LECs “[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with no unreasonable dialing delays.”<sup>147</sup>

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<sup>146</sup> 47 U.S.C. 271 (C)(2)(B)(xii). The positions and arguments of the parties with respect to Checklist Item 12 (Local Dialing Parity), as well as the ICC analysis and conclusions, are contained in the Final Order at paragraphs 2336 -- 2350.

<sup>147</sup> 47 U.S.C. 251(b)(3).

## **B. The State Perspective**

The ICC has addressed this issue within the context of toll services. On April 7, 1995, the Commission proposed a statewide rule that required all incumbent and new local exchange companies to allow customers to "presubscribe" to the long distance carrier of the customer's choice for local toll calls. Order, at Docket No. 94-0048, Illinois Commerce Commission, On Its Own Motion Adoption of Rules Relating to Intra-Market Service Area Presubscription and Changes in Dialing Arrangements Related to Implementation of Such Presubscription. (October 3, 1995). The rule, which became effective on November 1, 1995, requires that local exchange carriers offer presubscription by November 1, 1996, using the "2-PIC" method. (83 Ill. Adm. Code Part 773). The 2-PIC method allows end users to choose one carrier for local toll traffic and a different carrier for long distance traffic.

## **C. SBC Illinois' Demonstration of Compliance**

SBC Illinois alleged that it is in full compliance with checklist item 12. First, SBC Illinois demonstrated that its binding interconnection arrangements do not require any CLEC customer to use access codes or additional digits to complete local calls to SBC Illinois customers. Second, SBC Illinois demonstrated that its customers are not required to dial any access codes or additional digits to complete local calls to CLEC customers. Third, SBC Illinois demonstrated that CLEC central office switches are connected to the trunk side of SBC Illinois' switches in the same manner as SBC Illinois or other LEC switches.

## **D. Parties' Positions, Arguments and Evidence**

There were no issues regarding checklist item 12. All parties agreed to SBC Illinois' compliance.

## **E. Performance Data Review**

All parties agree that there are no ICC-approved performance measures related to checklist item 12, and the ICC did not direct BearingPoint to test performance with respect to local dialing parity.

## **F. ICC Findings and Recommendation – Checklist Item 12**

The ICC concluded that SBC Illinois satisfies the requirements of checklist item 12. It found that there are no different or additional dialing requirements for CLEC customers, or any built in delays. From the end user's perspective, the interconnection of SBC Illinois networks and CLEC networks is seamless.

## CHECKLIST ITEM 13 - RECIPROCAL COMPENSATION.

### A. Standards for Review

Section 271(c)(2)(B)(xiii) of the Act requires that a 271 applicant: enter into “[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2).” 47 U.S.C. Section 271 (c)(2)(B)(xiii).<sup>148</sup> Section 251 (b) (5) establishes the LEC duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. For purposes of compliance with section 251(b)(5) above, Section 252 (d)(2)(A) provides that “a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless: (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.”<sup>149</sup>

Section 252 (d)(2) (B), sets out “rules of construction for paragraph (2) directing that this paragraph shall not be construed: (i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive recovery (such as bill-area-keep arrangements); or (ii) to authorize the [FCC] or any State Commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.”<sup>150</sup>

### B. The State Perspective

This Commission first examined reciprocal compensation rates in October 1994, when MFS filed a complaint against Ameritech Illinois for refusing to provide certain intercarrier arrangements that, it alleged, Ameritech Illinois had made available to other previously authorized independent local exchange carriers, i.e., adjacent incumbent LECs. This action was followed with similar complaints filed by TC Systems and MCI Communications. On February 8, 1995, the Commission ordered Ameritech Illinois to provide interconnection arrangements and reciprocal compensation to MFS until issues in the

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<sup>148</sup> The positions and arguments of the parties with respect to Checklist Item 13 (reciprocal compensation), as well as our analysis and conclusions, are contained in our Final Order at paragraphs 2351 -- 2528.

<sup>149</sup> 47 U.S.C. § 252 (d)(2)(A).

<sup>150</sup> See also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, CC Dockets 96-98 and 99-68, released April 27, 2001 (“ISP Compensation Order”).

“Customers First” dockets were decided. Interim Order, MFS Intelnet of Illinois, Inc. vs. Illinois Bell Telephone Company, Complaint and Petition as to Alleged Refusal to Provide Certain Inter-Carrier Arrangements, Docket No. 94-0422, (February 8, 1995).

In the Commission's investigation of Ameritech's Customers First Proposal, reciprocal compensations rates were addressed on a permanent basis. Order at 96-101, Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, Docket No. 94-0096, Illinois Bell Telephone Company Addendum to Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, Docket No. 94-0117, AT&T Communications of Illinois, Inc. Petition for an Investigation and Order Establishing Conditions Necessary to Permit Effective Exchange Competition to the Extent Feasible in Areas Served by Illinois Bell Telephone Company, Docket 94-0146, Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois (refiled), Docket No. 94-0301 Consolidated, (April 7, 1995), at 96-101.

In Docket Nos. 96-0486/96-0596 (consolidated), the Commission determined forward looking assumptions for Ameritech's cost models, these assumptions affected the rates for reciprocal compensation<sup>151</sup>. Order, Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, Docket No. 94-0096, Illinois Bell Telephone Company Addendum to Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, Docket 94-0117, AT&T Communications of Illinois, Inc. Petition for an Investigation and Order Establishing Conditions Necessary to Permit Effective Exchange Competition to the Extent Feasible in Areas Served by Illinois Bell Telephone Company, Docket No. 94-0146, Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois (refiled), Docket 94-0301 Consolidated, (April 7, 1995), at pp. 96-101.

The Commission also addressed reciprocal compensation in the context of ISP bound traffic. On March 11, 1998, the Commission entered an order requiring Ameritech Illinois to pay petitioning CLECs reciprocal compensation for calls that are within 15 miles and for traffic that is billable as local from its customers to ISPs that are customers of petitioning CLECs<sup>152</sup>. Order, Teleport Communications Group, Inc et al. v. Illinois Bell Telephone Company, Complaint as to Ameritech Illinois' Refusal to Pay Reciprocal Compensation for Local Traffic

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<sup>151</sup> Second Interim Order, Illinois Commerce Commission On Its Own Motion Investigation Into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements, Transport and Termination of Traffic, Docket 96-0486, Illinois Bell Telephone Company Proposed Rates, Terms and Conditions for Unbundled Network Elements, Docket 96-0569, Consolidated, (February 17, 1998).

<sup>152</sup> Teleport Communications Group, Inc et al. v. Illinois Bell Telephone Company, Complaint as to Ameritech Illinois' Refusal to Pay Reciprocal Compensation for Local Traffic Terminated by Complainant to Its Internet Service Provider Customers, Docket Nos. 97-0404/97-0519/97-0525 (cons). (Mar. 11, 1998).

Terminated by Complainant to Its Internet Service Provider Customers, Docket Nos. 97-0404/97-0519/97-0525 (cons). (Mar. 11, 1998).

The Commission reexamined the reciprocal compensation issue in an Arbitration case, i.e., Docket No. 00-0027. The Commission reaffirmed its past decision on this issue but noted the need for a generic case to reexamine the impact of internet traffic on the reciprocal compensation payment structures. In August of 2000, the Commission initiated Docket No. 00-0555<sup>153</sup> to investigate the pricing of reciprocal compensation. Illinois Commerce Commission on Its Own Motion, [Establishing Rules for Reciprocal Compensation For Internet Service Provider-bound Traffic], Initiating Order, Docket No. 00-0555. (August 17, 2000).

On April 27, 2001, the Federal Communications Commission ("FCC") released an order addressing intercarrier compensation. (In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, CC Dockets 96-98 and 99-68, released April 27, 2001) ("ISP Compensation Order"). After this Order was released, Staff filed a motion to dismiss Docket No. 00-0555 because the FCC's Order pre-empted the States authority over the pricing of ISP bound traffic. The Commission dismissed Docket No. 00-0555 on July 25, 2001.

### **C. SBC Illinois' Demonstration of Compliance**

SBC contended that the following facts demonstrate its Checklist Item 13 compliance: (1) SBC has entered into reciprocal compensation arrangements as part of legally binding interconnection agreements and an effective tariff, and it is paying reciprocal compensation under those arrangements; (2) SBC's agreements provide for reciprocal compensation at least to the extent required by the Act; and (3) the Commission has approved rates for reciprocal compensation, and has found them consistent with TELRIC cost principles and with section 252(d)(2).

This Commission, SBC maintained, has ordered it to pay reciprocal compensation on ISP-bound traffic under certain interconnection agreements. Recently however, SBC noted, the FCC has determined that "ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5)."<sup>154</sup> Nevertheless, SBC maintains, it complies with the ICC's orders, pending judicial review. More important is that the FCC has steadfastly held that a BOC's

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<sup>153</sup> Illinois Commerce Commission on Its Own Motion, [Establishing Rules for Reciprocal Compensation For Internet Service Provider-bound Traffic], Initiating Order, Docket No. 00-0555, (August 17, 2000).

<sup>154</sup> ISP Compensation Order, ¶ 3.

payment (or non-payment) of inter-carrier compensation on ISP-bound traffic is “irrelevant to checklist item 13.”<sup>155</sup>

#### **D. Parties’ Positions, Arguments and Evidence**

AT&T alleged that SBC does not allow CLECs to opt in to other carriers’ interconnection agreements regardless of whether those agreements were executed before, or after, the entry of the ISP Compensation Order. Further, it argued, SBC has refused to offer CLECs the rate caps the FCC imposed on reciprocal compensation traffic in its ISP Compensation Order. Instead, AT&T noted, SBC offers to CLECs a reciprocal compensation mechanism called the “bifurcated rate” that contains a high first minute rate and a minuscule per minute rate for additional minutes. Applying SBC’ bifurcated rate structure to calls to ISPs, AT&T argues, results in a smaller payment from SBC than using an average charge per minute.

The AG noted that Checklist Item 13 specifically requires that BOCs seeking to enter the long distance market have reciprocal compensation arrangements in place. According to the AG, SBC’s position that this Commission need not review its reciprocal compensation arrangements and that they are not subject to state law, presents a question of law for the Commission to resolve.

Clearly, the AG argued, Congress intended that reciprocal compensation arrangements be subject to oversight. It further noted that the FCC’s ISP Compensation Order offered BOCs an alternative reciprocal compensation arrangement, i.e. rate caps, if they choose to treat all traffic, ISP-bound and local, the same. The AG understood SBC to argue that even in the absence of choosing rate caps, all traffic should be treated as ISP-bound and not local. In the AG’s view, this would effectively remove the Checklist Item 13 requirement from Section 271 contrary to the plain language of this provision and Congressional intent. Where SBC has not opted for the rate caps, the AG maintained, the default assumption should be that state rules apply -- not that no rules apply.

Staff stated that the evidence shows that SBC does not provide: (i) cost based reciprocal compensation rates as required by Section 252(d)(2); (ii) reciprocal compensation rates, terms, and conditions in accordance with the ISP Compensation Order; and (iii) nondiscriminatory access to reciprocal compensation rates per Section 251(c)(2) and the ISP Compensation Order. Staff testified that it reviewed the “Level 3 Agreement” referred to by SBC in order to assess whether the reciprocal compensation rates contained therein are, as asserted, based on costs developed pursuant to the requirements mandated by the Commission in its *TELRIC Order*. Staff claimed that the rates contained in that agreement are “not fully consistent with the cost assumptions, rate structure and rates” that SBC has adopted as a result of the TELRIC Order. Staff also

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<sup>155</sup> See Kansas & Oklahoma 271 Order, ¶ 251; Pennsylvania 271 Order, ¶ 119.

indicated that Ameritech's tariff, which does not contain a two-part rate structure, is inconsistent with the way in which SBC incurs its costs and thus does not comply with the FCC's rules. To date, Staff noted, SBC has rejected the FCC's reciprocal compensation mechanism and chosen to implement its own local and ISP-bound intercarrier compensation scheme in Illinois. SBC's offering, according to Staff, does not comply with either the ISP Compensation Order or Section 271 of the 1996 Act, nor has it been submitted to the Commission for its review.

Staff's concern arose from SBC taking the position that it "might" adopt the FCC solution at some undisclosed time. Staff cites to a number of legal opinions and treatises which hold to the proposition that where an order, statute or contract imposes "a duty" or requires the performance of some action, but is silent as to when it is to be performed, a reasonable time is implied. Noting that it is now been well over a year since the FCC released the ISP Compensation Order, Staff asserted that that was a reasonable amount of time for SBC to make its election.

In arbitrating the Ameritech/Focal Interconnection Agreement, Staff pointed out that the ICC required SBC to treat ISP-bound traffic as local traffic.<sup>156</sup> Staff argues that a requesting carrier should be able to obtain the Ameritech/Focal Agreement rates not only because Focal obtained those rates, but because the rates in that agreement are those required under the FCC's ISP-Bound Traffic Order.

According to Staff, SBC improperly expanded the FCC's limitation of opt-in rights on reciprocal compensation rates for ISP-bound traffic to all reciprocal compensation rates, terms, and conditions for non-ISP-bound traffic governed by Section 251(b)(5). Until and unless SBC elects the FCC rate caps, Staff contended, it is required to maintain the same pricing regime for reciprocal compensation that the ICC has consistently maintained in Illinois. According to Staff, the rates contained in existing interconnection agreements in Illinois are consistent with the FCC's reciprocal compensation guidelines. Thus, there is no reason for SBC to deny carriers access to the reciprocal compensation rates, terms, and conditions found in its existing interconnection agreements. In sum, Staff alleged that SBC's actions and policies were anticompetitive and constituted violations of its duty under Section 251(c)(2) to provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" and its duty under Section 251(c)(1) "to negotiate in good faith."

The only dispute at hand, SBC asserted, concerns a subject that does not matter for purposes of the checklist, and is not even ripe for adjudication, i.e., the terms that SBC "offers" for future reciprocal compensation arrangements to implement the FCC's ISP Compensation Order. First, SBC noted, the ICC has held that disputes related to compensation for ISP-bound traffic fall outside its

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<sup>156</sup> Arbitration Decision at 12, Docket 00-0027, May 8, 2000.

jurisdiction and within the exclusive purview of the FCC.<sup>157</sup> Second, SBC asserted, the FCC has held that compensation for ISP-bound traffic is irrelevant to Checklist Item 13, because the 1996 Act's provision on reciprocal compensation, i.e., section 251(b)(5), does not apply to such traffic in the first place.<sup>158</sup>

In response to Staff and AT&T's assertions, SBC argued that the bifurcated rate offer is just that, an offer, being extended to carriers that seek to negotiate new or amended agreements. Thus SBC does not impose anything on anyone. Exploring the various types of scenarios, SBC explains that (1) carriers that already have agreements with unitary rates can continue under their existing arrangements; (2) carriers that order from tariffs will continue to receive the tariffed unitary rates; (3) carriers agreeing to the bifurcated structure can accept SBC's offer and enter into a binding agreement; and (4) carriers that want new agreements but disagree with the bifurcated structure can seek negotiations or arbitration.

One solution to the problem of imbalanced traffic, SBC contended, is to establish a contingent, lower rate that applies when traffic is out of balance. SBC and Level 3 agreed to such an arrangement and amended their interconnection agreement to reflect it. While Staff suggested that the amended agreement no longer matches the Commission-approved rates, there is no shortage of interconnection agreements that reflect the approved rates (as does the tariff), such that SBC still meets its burden of proof. The Level 3 amendment also comports with the 1996 Act, SBC contended, noting that Section 251(a) upholds voluntary agreements even if their terms differ from the Act's requirements, and the FCC specifically cited the Level 3 amendment to support the elective "caps" established by the ISP Compensation Order.<sup>159</sup>

SBC demonstrated that it need not permit CLECs to "opt in" to terms and provisions for reciprocal compensation in existing interconnection agreements, because the FCC has held that the Act's "opt in" provisions do not apply to terms and conditions related to compensation for ISP-bound traffic.<sup>160</sup> If and when a CLEC really wants to opt into the reciprocal compensation provision of a specific agreement, SBC noted, it is free to negotiate that request with SBC; and, if the parties do not reach agreement the CLEC can raise the matter before the ICC. In this situation the ICC can resolve the matter based on facts, and not in the abstract.

SBC urged the Commission to reject out of hand AT&T's insinuation that the rate caps are "the FCC's rates" and that SBC has disobeyed the FCC's order by not adopting them. Staff itself acknowledged, according to SBC, that the rate caps are elective, not mandatory. SBC maintains that Staff's error lies in its view that the election period has expired and that SBC violates the "intent and letter"

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<sup>157</sup> Order at 8, Docket 01-0427 July 24, 2002.

<sup>158</sup> Georgia & Louisiana 271 Order, ¶ 272.

<sup>159</sup> See Id. ¶ 85 & n.158.

<sup>160</sup> ISP Compensation Order, ¶¶ 2, 82.

of the ISP Compensation Order simply by *offering* language that would allow SBC to elect the caps in the future on 20 days' notice. By Staff's own admission its position has no support in the FCC's Order. As such, SBC continues, Staff simply applied a "reasonable time" limitation onto the FCC's order and then decided for itself what that time limit should be.

Staff argued that the information being offered by the Company does not demonstrate that the arrangements SBC enters into contain Section 271 compliant rates, terms, and conditions. Since the time that the FCC's ISP-Compensation Order became effective SBC has not agreed to include the reciprocal compensation rates contained in its tariff in its interconnection agreements with CLECs and, it noted, SBC does not dispute this fact.

Staff challenged SBC's statement that it "offers CLECs an alternative rate structure through its GIA." To the extent that SBC does not permit carriers to adopt its current tariffed reciprocal compensation rates in their interconnection agreements, Staff maintains that it is not offering its bifurcated rate structure as an actual alternative. SBC has not submitted a tariff containing its bifurcated rates at the ICC, Staff contended, resulting in the fact that the ICC has not found its revised rates to be TELRIC compliant. Whereas SBC has argued that its current tariffed local reciprocal compensation rates are not TELRIC compliant, Staff noted that the company has not sought Commission approval for rates that it considers TELRIC compliant.

Staff contended that requesting carriers cannot opt-into or obtain, without arbitration, any current interconnection agreement that includes the Company's existing tariffed local reciprocal compensation rates. Staff noted that the FCC limited its opt-in restriction for reciprocal compensation "to the rates paid for the exchange of ISP-bound traffic."<sup>161</sup> The clear implication of this language, it argues, is that the FCC was not restricting the ability of carriers to opt into reciprocal compensation rates, terms and conditions for non-ISP-bound traffic. The FCC's language in the ISP Compensation Order, Staff contended, is clear on its face. In the event that SBC does not elect to use the FCC's reciprocal compensation rate caps, it "must exchange ISP-bound traffic at the state-approved or state-negotiated reciprocal compensation rates" (i.e., the rate currently contained in Ameritech's reciprocal compensation tariff).<sup>162</sup>

If SBC chooses not to operate under the FCC's transition plan (i.e., declines to operate under the rate caps), Staff contended, there is no support for an opt-in restriction that denies carriers the very rates the ISP Compensation Order requires SBC to provide. According to Staff, SBC has declined to invoke the rate caps, but it still invokes the opt-in restriction.

Regarding SBC's position that the absence of any reference to a specific date or time period in the ISP Compensation Order means that it is free at any time to change the pricing regime applicable to ISP-bound and Section 251(b)(5)

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<sup>161</sup> ISP Compensation Order, ¶ 82.

<sup>162</sup> Id., ¶ 8 (emphasis added).

traffic; such a proposition, Staff counters, is contrary to the law that holds: “Where an order, statute or contract imposes a duty or requires the performance of some action, but is silent as to when it is to be performed, a reasonable time is implied under general rules of construction.”

Staff also contended that it is entirely proper and permissible for the ICC to advise the FCC, that: (i) it interprets the FCC’s ISP Compensation Order to require ILECs to decide whether to elect the rate caps set forth therein within a reasonable amount of time from the date of the FCC’s order; and, (ii) that SBC is not in compliance with Checklist Item 1 because its policy (asserting that it is free to elect the FCC’s reciprocal compensation rate caps at any point in the future) is contrary to the ISP Compensation Order, impedes competition, and creates uncertainty in violation of Ameritech’s duties, i.e., to provide interconnection on rates, terms and conditions that are just, reasonable and non-discriminatory and to negotiate in good faith.

AT&T agreed with Staff’s assertion that Ameritech’s refusal to permit a CLEC to opt in to the reciprocal compensation provisions applicable to local, non-ISP bound traffic included in the Focal/SBC interconnection agreement, as approved by the ICC, constitutes a violation of Section 252(i) of the federal Act, the FCC’s ISP Compensation Order and Ameritech’s obligation to provide non-discriminatory reciprocal compensation rates, terms and conditions pursuant to Section 252(d)(2). Moreover, AT&T contended, SBC’s refusal to allow a CLEC to incorporate its tariffed reciprocal compensation rates into an interconnection agreement violates the federal Act, the ISP Compensation Order and this Commission’s orders regarding reciprocal compensation for local non-ISP bound traffic.

AT&T agreed with Staff that SBC violated Checklist Item 1 as well as Checklist Item 13 by failing to allow CLECs to opt into the provisions of existing agreements relating to reciprocal compensation for non-ISP bound local traffic. Because of this action, AT&T contended, an Illinois CLEC cannot opt into an entire interconnection agreement in Illinois, but must negotiate and/or arbitrate a new agreement each time. SBC’s policy in this regard, AT&T asserted, not only violated this Commission’s Merger Order and Section 252(i) of the federal Act, but its reciprocal compensation rates, terms and conditions are also not nondiscriminatory as required by Section 251(b)(2) of the Act.

In its ISP Compensation Order, the AG noted, the FCC concluded that ISP-bound traffic, only, is not subject to section 251(b)(5) reciprocal compensation requirements. The AG considers SBC to be in violation of checklist item (xiii), because of its position that all CLEC traffic, local and ISP-bound is affected, and because it does not allow carrier to use the “opt-in” provisions of section 252(i) to obtain reciprocal compensation rates for local traffic.

Prior to giving SBC a positive Section 271 recommendation to the FCC, Staff urged that the ICC require SBC to take certain steps. Regarding Checklist

Item 1 Compliance, Staff would require SBC to: (1) permit carriers to opt-into, without the need for negotiation or arbitration, reciprocal compensation rates, terms, and conditions, and, therefore, into entire interconnection agreements, particularly when such agreements contain rates, terms, and conditions that this Commission and the FCC require SBC to provide; (2) make it known that SBC does not plan to elect the FCC's reciprocal compensation rate caps or make an immediate election of the FCC's rate caps. Alternatively, Staff said that the ICC should rule that SBC's decision to not offer to exchange all traffic subject to Section 251(b)(5) at the same ISP-bound traffic rates set by the FCC for more than a year following the FCC's ISP-Bound Compensation Order amounts to an election and precludes SBC from picking and choosing a different pricing scheme at this time; or alternatively, it should rule that SBC's decision to not offer to exchange all traffic subject to Section 251(b)(5) at the same ISP-bound traffic rates set by the FCC for almost 11 months following the FCC's *ISP-Bound Traffic Order* amounts to an election and precludes SBC from picking and choosing a different pricing scheme at this time.

Regarding Checklist Item 13 Compliance, Staff would require SBC to: (1) to update its tariffed reciprocal compensation rates and obtain the ICC's approval of the updated reciprocal compensation cost studies that support these rates; or, alternatively, to submit state-to-state reciprocal compensation rate comparisons and any other evidence to demonstrate that its reciprocal compensation rates are in the range that can be considered by any reasonable standard within the range of TELRIC compliance; and (2) permit carriers to opt-into, without the need for negotiation or arbitration, reciprocal compensation rates, terms, and conditions for reciprocal compensation of traffic subject to Section 251(b)(5) of the federal Act in existing interconnection agreements between SBC and CLECs.

#### **E. Performance Data Review**

There are no ICC-approved performance measures for this checklist item, and Bearing Point was not directed to test in this area.

#### **F. ICC Findings and Recommendation – Checklist Item 13**

The ICC noted, at the outset, that no party or Staff disputed SBC's entry into agreements containing reciprocal compensation provisions. There were, however, a number of claims suggesting that SBC's non-compliance with the FCC's ISP Compensation Order precludes a satisfaction of its Checklist Item 13 obligations as well as its Checklist Item 1 obligations. In order to gain a clear perspective on the issues the ICC carefully examined and construed the FCC Order that gave rise to the disputes.

Having reviewed the ISP Compensation Order in all critical aspects, the ICC considered Staff's assertions of non-compliance based on SBC's failure to make an election of the FCC rate caps within a "reasonable" time. The ICC

noted, however, and Staff acknowledges too, that the FCC does not establish a date certain by which an ILEC need make an election. Pursuant to the ISP Compensation Order, the interim compensation scheme applies as carriers “renegotiate” expired or expiring interconnection agreements.<sup>163</sup> This pronouncement answers Staff’s time frame concerns.

In the end, the ICC found that it had no authority to graft an “election” deadline onto an order it itself has not authored, and which is unsupported by a reading of the ISP order as a whole. Moreover, given that there is no formal mechanism by which an ILEC makes an election, the ICC had difficulty understanding Staff’s claim that SBC has neither accepted, nor rejected, the rate caps. Further, Staff’s legal proposition fails in this instance in that there is no “duty” put on SBC to perform; it is merely provided with the right to exercise an option.

The ICC reasoned that where Staff speaks of the need for “certainty,” the FCC fashioned its ISP Compensation Order around the concept of “expectancy.” As such, the FCC believed it prudent to avoid a “flash cut” to a new compensation regime that would upset the legitimate business expectations of carriers and their customers. According to the FCC, the CLECs have been put on notice since the 1999 Declaratory Ruling<sup>164</sup> that it might be unwise to rely on the continued receipt of reciprocal compensation for ISP-bound traffic. Thus, it noted, many have begun the process of weaning themselves from these revenues.<sup>165</sup> The three-year transition ensures that carriers have sufficient time to re-order their business plans and customer relationships, should they so choose, in light of its tentative conclusion that “bill and keep” is the appropriate long-term compensation regime.<sup>166</sup> Staff assumed that CLECs are put into the position of uncertainty by SBC’s failure to make an election of the FCC’s interim rates. The ICC finds that if this is the case, it is a fault of the FCC’s order that we cannot disturb or remedy. The ICC found that it is in no position to interpret its provisions as Staff proposed. The ICC was not shown a single factual instance where the plain directives of the Order have been violated. Therefore, it found that law does not support the remedial actions that Staff recommended.

The ICC observed that not one CLEC with an interest came forward to complain of a real-life dispute related to an opt-in situation. While AT&T made a number of contentions, it did not allege that it was improperly denied such rights in the formulation of its agreement. The XO matter did not invoke ICC action and is not probative on any issue. Given that the ICC has approved an actual real life agreement, it need not and did not take a position based on an abstract proposition.

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<sup>163</sup> Id.

<sup>164</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*).

<sup>165</sup> Id. at 84.

<sup>166</sup> Id. at 83.

The ICC agreed with SBC's point that there is no ripe issue to review. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur (1) as anticipated, or (2) at all.<sup>167</sup> So too, the ICC found it inappropriate and contrary to the promotion of judicial and administrative economy to maintain a position based only on a theoretical issue than may never affect the appellant.<sup>168</sup>

The ripeness doctrine requires a court to evaluate both the fitness of the issues for decision and the hardship to the parties of withholding court consideration. As to the fitness of the issue at hand, Staff would have us find that under no circumstances whatsoever should SBC be allowed to deny opt-in to any agreement under any situation. Like the Court in Texas, we do not have sufficient confidence in our powers of imagination to affirm such a negative. There is no hardship to consider, because the right to seek arbitration will put the matter squarely before the ICC. To be sure, factual development in such instance is the only way to advance our ability to deal concretely and decidedly with the issues.

The FCC will have the record of this proceeding at its disposal when making an assessment of SBC's compliance with Section 271. With respect to the instant issues, the ICC urged the FCC to consider whether the lack of a specific deadline by which the ILEC needs to make an "election" is a serious concern. There is no question that, as a general matter, SBC must permit carriers to incorporate the reciprocal compensation rates included in its Illinois tariffs into its interconnection agreements even as the parties are free to negotiate otherwise. Should the Company believe it is entitled under FCC rules to revise the reciprocal compensation rates included in its Illinois tariffs then it must follow ICC rules and regulations to enact such a change.<sup>169</sup>

Any disputes regarding the Company intentionally impairing or delaying a requesting carrier's ability to obtain access to rates, terms, and conditions that the ICC and/or the FCC require will be closely examined by the ICC and dealt with in due course. On the whole, and on the basis of the relevant evidence, and there being no "factual" dispute to resolve, the ICC found SBC to be compliant with the requirements of Checklist Item 13.

#### **CHECKLIST ITEM 14 – RESALE.**

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<sup>167</sup> Texas v. United States, 523 U.S. 726 (1998).

<sup>168</sup> A. Finkl & Sons v. ICC, 620 N.E. 2d 1141 (1<sup>st</sup> Dist. 1993); appeal denied, 624 N.E. 2d 804.

<sup>169</sup> On June 16, 2003 SBC Illinois distributed an Accessible Letter to CLECs, stating that it offers to exchange all Section 251(b)(5) traffic on and after September 1, 2003 in accordance with the rates, terms and conditions of the FCC's interim ISP terminating compensation plan in the state of Illinois.

## **A. Standards for Review**

Section 271(c)(2)(B)(xiv) of the Act requires a 271 applicant to make telecommunications services ... available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).” 47 U.S.C. 271(c)(2)(B)(xiv).<sup>170</sup> Section 251(c)(4)(A) of the Act requires incumbent LECs “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”<sup>171</sup> Further, section 251(c)(4)(B) prohibits “unreasonable or discriminatory conditions or limitations” on service resold under section 251(c)(4)(A).<sup>172</sup> Finally, section 252(d)(3) requires state commissions to “determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”<sup>173</sup>

In the Local Competition First Report and Order, the FCC concluded that resale restrictions generally are presumed to be unreasonable unless the LEC proves to the state commission that the restriction is reasonable and nondiscriminatory. If an incumbent LEC makes a service available only to a specific category of retail subscribers, however, a state commission may prohibit a carrier that obtains the service pursuant to section 251(c)(4)(A) from offering the service to a different category of subscribers. Where a state creates such a limitation, it must do so consistent with requirements established by the FCC.

In accordance with sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv), a BOC must also demonstrate that it provides nondiscriminatory access to OSS for the resale of its retail telecommunications services. The obligations of section 251(c)(4), apply to the “retail” telecommunications services offered by a BOC’s advanced services affiliate.<sup>174</sup>

## **B. The State Perspective**

In September of 1995, AT&T petitioned the ICC for the creation of a wholesale service tariff. The 1996 Act also required resale of the incumbent’s retail telecommunications services. The Commission considered AT&T’s petition and the 1996 Act in Docket No. 95-0458, releasing its Order in June of 1996.

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<sup>170</sup> The positions and arguments of the parties with respect to Checklist Item 14 (reciprocal compensation), as well as our analysis and conclusions, are contained in our Final Order at paragraphs 2529 -- 2586.

<sup>171</sup> 47 U.S.C. § 251 (c)(4)(A).

<sup>172</sup> 47 U.S.C. § 251(c)(4)(B).

<sup>173</sup> 47 U.S.C. § 252(d)(3).

<sup>174</sup> See Verizon Connecticut Order, 16 FCC Rcd 14147, 14160-63, paras. 27-33 (2001); Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C. Cir. 2001).

The resulting ICC Order includes a formula to calculate wholesale/resale rates. SBC set out its wholesale rates in a wholesale compliance tariff in 1996, which the ICC investigated in Docket No. 97-0553. (Illinois Commerce Commission On Its Own Motion v. Illinois Bell Telephone Company Investigation of certain Illinois Bell Telephone Company wholesale non- competitive tariffs, pursuant to Section 9-250 of the Public Utilities Act, Docket No. 97-0553. (Docket initiated October 10, 1997).) While testimony was taken and hearings conducted in the case, no order was ever issued in that case. The issues of 97-0553 were addressed in Docket No. 98-0555.

### **C. SBC Illinois' Demonstration of Compliance**

SBC maintained that it provides telecommunications services to CLECs, for resale, that are identical to the services being furnished to its own retail customers. It asserted that CLECs are able to resell these services to the same customer groups and in the same manner as SBC. SBC offers wholesale discounts on promotional offerings lasting more than 90 days. For retail services that SBC offers to a limited group of customers (such as grandfathered services), SBC explained that it allows resale to the same group of customers to which it sells the services, in accordance with 47 C.F.R. § 51.615.

SBC explained that its affiliate, Ameritech Advanced Data Services, Inc. ("AADS") provides certain advanced services. According to SBC, the ICC need not decide whether the Act's resale obligations apply to affiliates like AADS, because even if they do, AADS is in compliance. SBC observes that the "category of services subject to the provisions of section 251(c)(4) is determined by whether those services are: (1) telecommunications services that an incumbent LEC provides (2) at retail, and (3) to subscribers who are not telecommunications carriers."<sup>175</sup> AADS provides data transmission services like Frame Relay and ATM Cell Relay at retail, SBC noted, and it makes those services available for resale at a wholesale discount.

SBC testified that AADS provides a wholesale service called "DSL Transport" to unaffiliated ISPs, who add familiar Internet services (such as e-mail, Internet access, and personal web pages) to create a high-speed Internet access service. The FCC has held, SBC points out, that wholesale DSL transport service "is a wholesale service offering.... Because that offering is not a telecommunications service sold at retail, [the BOC] is not required to offer it at a resale discount pursuant to section 251(c)(4)."<sup>176</sup>

Further, SBC asserted, AADS provides DSL transport to an affiliated ISP known as Ameritech Interactive Media Services ("AIMS"), which offers a high-speed Internet access service to end users. Here too, SBC observes, the FCC has held that section 271 does not require that the bundled Internet access

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<sup>175</sup> Arkansas & Missouri 271 Order, para. 80.

<sup>176</sup> Arkansas & Missouri 271 Order, para. 80.

service (which is an information service, not a telecommunications service) or the underlying wholesale DSL transport be made available for resale. Order ICC Docket No. 01-0662 at ¶ 2543.

#### **D. Parties' Positions, Arguments and Evidence**

In ASCENT<sup>177</sup>, the AG noted, the Court held that SBC/Ameritech could not escape the resale obligations in section 251(c)(4) by offering advanced services through an affiliate. The ASCENT court, the AG observed, specifically rejected the arguments in support of relieving SBC/Ameritech of its resale obligations.<sup>178</sup> The Court's decision leaves no doubt, the AG contended, but that the existence of a separate affiliate is irrelevant to SBC/Ameritech's resale obligations.

The fact that broadband deployment is a matter of state public concern, the AG argued, makes SBC's efforts to avoid its DSL resale obligations an issue that the People will further pursue under the public interest requirement of section 271. Regardless of whether the public interest is implicated, the AG contended, SBC's failure to offer DSL for resale in accordance with the Commission's resale Order and formula shows that it has not satisfied Checklist Item 14.

According to Staff, SBC has shown, in testimony, that it satisfied the requirements of Checklist Item 14 with respect to its DSL services. Staff contended that SBC currently has no federal obligation to provide DSL transport to retail end users on a stand-alone basis. On the whole, Staff maintained that SBC has properly applied discounts to its wholesale rates, and they are just and reasonable.

AT&T did not raise any issues in connection with resale but reserved its right to do so should issues arise. No other CLECs raised issues here.

With one minor exception, SBC noted, there is no dispute as to whether it satisfies the requirements of Checklist Item 14. Regarding the AG's claim that SBC's affiliate AADS must provide DSL transport at a wholesale discount, SBC claimed this issue arises from a fundamental misapprehension of the matter at hand. SBC explained that DSL transport is sold to ISPs and, as a matter of law, these are not "retail" sales that trigger the duty to resell the service at a wholesale discount.<sup>179</sup> Accordingly, SBC contended, there is no obligation under section 251(c)(4) of the Act for AADS to offer DSL transport service for resale at a wholesale discount. Further, SBC observes that the ASCENT decision on which the Attorney General relies, does not factor into this analysis.

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<sup>177</sup> Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C.Cir. 2001) ("ASCENT v. FCC").

<sup>178</sup> Id. at 668.

<sup>179</sup> Arkansas & Missouri 271 Order, para. 80.

## **E. Performance Data Review**

SBC stated that its commercial performance results, as well as the results of Bearing Point's test, demonstrate that it provides CLECs resold services in accordance with the requirements of checklist item 14. SBC states that, for several key measures, its performance for resold service was *better* than retail in every month. SBC installed resale service faster, and with fewer missed due dates, than retail in all four main service categories (residential and business, with and without field work). SBC also stated that, even where due dates were missed, the delays for resale were shorter than for retail. Further, SBC noted that the rate of trouble reports on new resale installations was significantly lower across the board than for its own retail services.

Moreover, SBC stated that it achieved similar success in maintenance. Further, the percentage of out-of-service resold lines restored within 24 hours was in parity with retail, and was consistently high. The quality of work was also better than for retail, SBC stated, as the rate of "repeat" trouble reports for resale was generally lower in each month than for retail. Order ICC Docket No. 01-0662 ¶2564-2565.

BearingPoint found that SBC provides high quality service with respect to the timely issuance of resale order confirmations, resale order flow through, and resale line repairs. BearingPoint's transaction testing included 16 different resale scenarios, and BearingPoint also included resale bills in its billing tests. BearingPoint's review of processes and procedures included those applicable to resale.

Checklist item 14, Staff informed, concerns resale and encompasses the following performance measures: PMs 27, 28, 29, 30, 31, 32, 33, 35, 37, 37.1, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, and 54.1. Out of 156 resale sub-measures, Staff noted, SBC passed 92 sub-measures and failed 7 sub-measures. There were 57 sub-measures with insufficient data. Accordingly, of resale sub-measures with sufficient data to make a determination, SBC passed 92 out of 99, for a 93% pass rate.

According to Staff, SBC continues to provide sub-measure 37-1 at a rate of 50%, therefore SBC provides PM 37 in a discriminatory manner. Data reported by SBC indicated that there are a statistically higher number of trouble reports for SBC facilities provisioned to CLEC customers than there are numbers of trouble reports from SBC customers for POTS residential (PM 37-1). SBC's performance relative to checklist item 14 is unsatisfactory, based primarily on the Company's performance on PM 37 - Trouble Report Rate.

Staff indicated that SBC has exhibited significant problems with trouble reports, as indicated in PMs 37-1, 54-4, 54-6, and 54.1-4. SBC indicates that the problems associated with PMs 54-4 and 54.1-4 are related more to "disparate sample sizes" than to SBC performance problems. Presumably, this same

reasoning applies to sub-measure 54-6, although SBC is silent on that sub-PM. However, this rationale does not explain the problems SBC has been experiencing with respect to PM 37-1, since this PM reflects service quality to all residential plain old telephone service customers. It is also a PM in which SBC has successfully met the standard in previous months – specifically, April 2002 through September 2002. Inexplicably, SBC failed this sub-measure in October and November 2002.

As of March 4, 2003, information posted by SBC to CLEC Online indicates that SBC's performance for sub-measures 37-1 -- trouble report rate for POTS Residential, and 37-4, regarding trouble report rate for UNE-P Business, failed in December 2002. Sub-measure 37-1 passed in December 2002 (z-factor of – 0.071) but failed rather dramatically in January 2003 (z-factor of 12.747), and sub-measure failed in December 2002 (z-factor of 5.705) but passed in January 2003 (z-factor of 1.226). SBC stated that system improvements to address the issue are in the process of being made; however, significant failures persist. Since SBC is unable to provide this PM in general conformance with its standard, SBC fails to provide PM 37 in a non-discriminatory manner. As such, it remained on Staff's "Key PM's Requiring Improvement" table.

Regarding PM 37 – Trouble Report Rate, SBC explained that two submeasures address the trouble report rate for resold POTS, and that, while SBC passed the submeasure relating to resold business POTS, it did not meet the benchmark in two of the three months for resold residential POTS. While retail residential POTS experienced a trouble report rate of 2.29 per hundred in October 2002 and 1.65 in November, the numbers for resold residential POTS were 2.57 and 1.80, respectively. SBC stated that this shortfall is not significant to overall compliance, but also explained that it has identified the installation troubles that caused the out-of-parity situation, and has implemented system enhancements to address the issue.

#### **F. ICC Findings and Recommendation – Checklist Item 14**

On the basis of SBC's showing, and there being no legitimate disputes raised with respect thereto, the ICC found SBC to be in compliance with the requirements and obligations of Checklist Item 14. Thus, there were no remedial actions required of the Company. Certain matters raised by the AG were considered to be outside the obligations and showings under this Checklist item. Such, however, were deferred to and addressed under the ICC's Public Interest analysis section of the ICC's order in Docket No. 01-0662.

The ICC noted that there was little dispute about the majority of SBC's commercial performance results under this checklist item. Many measures showed that the resold services that SBC provides CLECs are at least equal in quality to its own retail services, if not higher in quality. With respect to "Centrex with field work" orders and missed repair commitments for residential POTS

without dispatch, the Commission concluded that the shortfalls reflected in SBC's commercial performance results were immaterial and do not affect SBC's compliance with this checklist item.

The one and only "Key PM" identified by Staff here concerned PM 37-01, the trouble report rate for resold residential POTS. This measure however, the ICC noted, is one for which SBC has successfully met the standard in previous months – specifically, in the period of April 2002 through September 2002. Inexplicably, SBC failed this sub-measure in October and November 2002 even as the shortfall in that measure was not significant (less than 0.30 reports per hundred). As of March 4, 2003, Staff generally informed, information posted by SBC to CLEC Online indicates that SBC's performance for sub-measures 37-1 -- trouble report rate for POTS Residential, and 37-4, regarding trouble report rate for UNE-P Business, failed in December 2002.

On the whole and taken in a proper context of all the surrounding circumstances, the ICC did not believe this single infirmity is significant enough to preclude a finding of compliance with Checklist Item 14. So too, the ICC balanced this evidence against SBC's record statements indicating that system improvements to address the issue are in the process of being made. The additional monitoring of PM 37 under these system changes, as suggested by SBC, was required by the ICC and factored into its assessment. On the record as a whole, the ICC found it reasonable to conclude that SBC satisfied the requirements of checklist item 14.

## **V. THE PUBLIC INTEREST REVIEW**

### **Standards for Review**

#### **1. Federal Standards**

With respect to a Section 271 application under its review, the FCC is directed to make a finding that, "the requested authorization is consistent with the public interest, convenience and necessity. 47 U.S.C. Section 271 (d). According to the FCC, and based on its extensive experience, compliance with the competitive checklist is itself a strong indicator that long distance entry is consistent with the public interest. The FCC recognizes, however, that the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, the FCC views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected.

(Adapted from the New Jersey 271 Order, with most cites and footnotes omitted).

## **2. The State Perspective.**

In its Initiating Order for Docket No. 01-0662, the ICC observed that the FCC has considered (1) competition in local exchange and long distance markets, (2) assurance of future compliance, and (3) CLEC claims of anticompetitive behavior, within the context of the public interest requirement. Additionally, the FCC has reviewed the sufficiency of the BOC's performance remedy plans to provide additional assurance that the local market will remain open after 271 authority is granted.

As such, the ICC indicated that it would fully investigate the performance remedy plan to ensure that the local market remains open to competition and to guard against backsliding following 271 approval. The ICC would also review and consider SBC Illinois compliance with the competitive checklist and related public interest issues. Further, and to the extent that a particular public interest issue is unrelated to the competitive checklist, but a party believes that it is important to the development of competition in Illinois, the party was free to comment on such issue. Should the ICC find any such argument important to the development of local competition, it would, at its discretion, provide consultation on this issue to the FCC.

## **3. Parties' Positions, Arguments and Evidence**

At the outset, SBC Illinois argued that the "public interest" test does not authorize a state commission to create regulations or conduct inquiries unrelated to the checklist compliance provisions of the federal statute, nor is it an opportunity to re-litigate issues raised in regard to Track A or checklist compliance. So too, it was noted, the FCC has found the public interest inquiry to be the wrong forum to advance new theories regarding ILEC obligations. According to SBC Illinois, any actions being proposed must be in the public – as opposed to an individual party's – interest.

SBC disputed the characterization of its activities as "failures of compliance" noting those acts to have been taken in good faith. It viewed the allegations of noncompliance issues that were raised as disputes regarding legal, factual and policy issues. SBC indicated that the Act imposes obligations upon it that have never been clear, and that the ICC's findings of anti-competitive conduct should be viewed in a whole and proper context.

More specifically, SBC viewed Staff's complaint regarding SBC's failure to provide shared transport as being of this nature, but not alleging a current failure. So too, SBC observed the Z-Tel line loss notification complaint to be an isolated matter among the many OSS functionalities that were deemed satisfactory. SBC further pointed out that the deficiencies were unintentional. SBC noted the WorldCom PIC change issue had predated the Act. With respect to the adoption of reciprocal compensation rates in interconnection agreements, SBC's position has been vindicated before the FCC, if not the ICC. As to special construction

charges, SBC amended its tariffs and procedures based upon the ICC's findings. Regarding the ICC's *UNE Order*, SBC observed that the disputes raised were good faith legal and factual issues, and the Company's failure to prevail on many of matters does not qualify as regulatory non-compliance. SBC further noted that both AT&T and WorldCom have been subject to adverse ICC orders in the Section 13-514 state proceedings brought against them.

All of its processes are not perfect, SBC explained, but the Company must serve a large number of CLECs with varying needs and capabilities and under such circumstances, problems and misunderstandings are certain to occur. If this is ever the case, the ICC has authority to review and resolve such problems.

WorldCom asserted that the ICC's responsibility to consult with the FCC on compliance exceeds a determination of whether SBC is in minimal, technical compliance with the checklist items. Both SBC's compliance with ICC orders, and the state of competition, are factors to be considered in determining whether the market is irreversibly open. According to WorldCom, the record indicated numerous instances of SBC ignoring or disobeying ICC directives with respect to special construction, line sharing, provisioning of high capacity circuits, and others. And, WorldCom asserted, Section 271 authority should be withheld until SBC demonstrates full compliance with ICC orders.

RCN indicated that the FCC has broad authority to determine whether an ILEC's entry into the long distance market is in the public interest, based on whether there is an adequate factual record in support of the proposition that entry will foster competition. SBC's entry into the long distance market should not be found to be in the public interest, RCN argued, until it is shown that the Company's Illinois market is irreversibly open to competition.

AT&T claimed that competition in SBC's territory is tenuous and the Company had failed to show that its market is irreversibly open. Further, AT&T argued, the FCC and ICC must be certain that SBC will continue to comply with the market-opening requirements after Section 271 is granted. An adequate Performance Remedy Plan is crucial to ensure that SBC does not "backslide" on the service quality it provides to CLECs. In addition, any non-compliance with the Act or state requirements by SBC Illinois should be considered. According to AT&T, SBC's record in this regard is substandard. SBC's tariff filed in purported compliance with the *State Line Sharing Orders*, requiring mirroring of draft tariff language, does not mirror such language. Likewise, SBC has only recently provided proper ULS-ST. SBC's tariff filed in compliance with the *State UNE Order* is under review. The public interest determination cannot be deferred to other state proceedings. It is necessary to a successful 271 application, and, AT&T argued, a BOC that persists in violating federal or state law requirements cannot pass this public interest test.

Z-Tel argued that SBC's application is contrary to the public interest for at least three reasons: (1) SBC has failed to comply with provisions of the Illinois PUA enacted in 2001; (2) SBC's "winback" campaign is anticompetitive and

discriminatory; and (3) SBC's performance remedy plan cannot guarantee that poor performance will be identified or corrected because SBC's metrics are bad, SBC scores its own performance, and CLECs have no way of verifying SBC's data.

According to the AG, the public interest standard should be considered in light of the purpose of the Act, i.e., to foster competition. According to the AG, other state commissions have addressed public interest issues such that the ICC should address both the status of the local market and state efforts at opening the market.

Cook County emphasized that SBC must comply with state laws and ICC orders consistent with the Act in order to satisfy Section 271 requirements. Both the Initiating Order for Docket No. 01-0662 and sound public policy, it argued, permits the consideration of the "public interest" in this investigation. While approval of SBC's application is important, the early record indicates that SBC must take corrective action with respect to several issues before the ICC can conclude that the "public interest" will be protected on grant of Section 271 approval.

Staff stated that the FCC considers the existence of a pattern of discriminatory conduct or regulatory violations to militate against a grant of Section 271 authority. In Staff's view, the Company's history of regulatory non-compliance was indicated by its refusal to provide shared transport, over years and in the face of numerous ICC and other decisions such that it had not provided this item until recently. Staff argued that certain orders indicate that SBC has engaged in anti-competitive conduct.

#### **4. ICC Preliminary Review and Discussion**

For present purposes, the ICC defined non-compliance as the failure, in a material sense, to follow through on the directives established in an ICC order. As such, non-compliance was not to be found, as many had asserted, in advancing a particular position for litigation purposes or in the pursuit of review afforded by law. The ICC did consider SBC's past activity with regard to shared transport as troublesome, but no longer viable. Other specific allegations of noncompliance were dated and either less probative, not at all, or not determined. Staff detailed numerous enforcement statutes that led the ICC to observe that the mechanism of state law is a viable anti-backsliding vehicle that Staff and the CLECs can use with respect to matters related to the state public interest.

#### **4. Disputed Issues Under the Public Interest**

##### **1. State Tariffing**

SBC contended that the rates, terms and conditions for almost all its wholesale products have been tariffed in Illinois, and it will tariff the remainder. It argued, however, that the 1996 Act does not require tariffs and prefers negotiated or arbitrated agreements. The FCC has held that an incumbent need not tariff any wholesale products for purposes of Section 271 and certain federal courts have found a tariffing requirement to be inconsistent with the statutory scheme. SBC noted too that Staff was unable to reconcile its proposed tariffing requirement with the federal Act.

Staff maintained that State law requires SBC to file tariffs for all telecommunications services: retail and wholesale. According to Staff, at least one carrier has an agreement that permits it to take tariffed rates at its election, and is prejudiced by SBC's failure to tariff. Staff argued that SBC's ICC-approved, TELRIC-based tariffed rates are, in many cases, lower than those offered in its Generic Interconnection Agreement ("GIA"). CLECs should have the opportunity to negotiate with SBC based on knowing SBC's actual cost-based rates. If a CLEC cannot obtain these rates through negotiation, the ICC might impose them through the arbitration process. SBC is obligated to have them on file.

### **ICC Analysis and Conclusion – State Tariffing**

The ICC determined that the tariffing of wholesale products must occur and serves the public interest insofar, and to the extent that, state law sets out this requirement.

## **2. SBC's GIA Offer**

Staff stated that SBC has adopted a GIA available throughout its region, which often serves as a starting point for negotiations, and contains Illinois-specific rates, terms and conditions. The GIA, Staff argued, contains some rates that are higher than ICC-approved rates, and SBC's GIA webpage makes no reference to ICC-approved rates or tariffs. According to Staff, the ICC should have SBC modify the webpage consistent with Staff's recommendations, or develop some other method by which its tariffed rates will be available to CLECs.

SBC considered the Staff proposal to be unnecessary and burdensome. SBC notes that the framework of negotiation and arbitration that the Act establishes does not require the GIA. SBC states that the Staff's proposal would impose administrative burdens and delay the negotiation process.

### **ICC Analysis and Conclusion – GIA Offer**

The ICC determined that Staff's detailed proposal with respect to SBC's GIA was both unnecessary and burdensome. It was rejected.

## **3. To Freeze or "Cap" Rates (Wholesale Products)**

Staff and certain other parties considered a five-year rate cap necessary in order to add stability to the market. It was argued that the telecommunications industry is a declining cost industry, and since SBC conceded that its switching costs, at least, are decreasing, this proposal would not do the Company much harm.

SBC argued that Section 271 authority is granted or denied based upon the rates now in effect, rather than rates the applicant might charge in the future. Moreover, a cap would prevent SBC from proposing new rates, contrary to the statutory requirement that rates be cost-based. The ICC must approve new rates, after a contested proceeding, before SBC can charge them and, in SBC's view, the ICC has aggressively implemented TELRIC principles in these matters.

### **ICC Analysis and Conclusion – Wholesale Rate Freeze**

The ICC found that it could not, and indeed would not, in the course of this proceeding and on the record presented, impose the requested rate cap. To do so, it determined, would be arbitrary and capricious.

#### **4. Preview of Cost Models**

Staff proposed that SBC obtain ICC approval of changes to its cost models before proposing updated or new UNE rates based on the updated models. In SBC Illinois' view, this would require the litigation of two dockets in each UNE rate proceeding, thereby adding time and complexity.

Staff argued that the evaluation of cost models is a time-consuming and resource-intensive undertaking. According to Staff, there might be several new models introduced in a proceeding.

### **ICC Analysis and Conclusion – Preview of Cost Models**

The ICC declined to adopt Staff's proposal. The ICC has always addressed cost models and rates in a single proceeding. Staff's arguments did not support a deviation from this course and this was not the time or place to address such a proposal.

#### **5. Wholesale DSL Transport To End Users**

Staff and the AG argued that SBC is attempting to avoid its Section 251(c)(4) resale obligation by selling retail DSL through unregulated affiliates. Federal law prohibits ILECs from avoiding obligations imposed under the Act by undertaking them through affiliates. Thus, these parties asserted, SBC should be compelled to provide DSL transport to end users at a wholesale discount.

SBC maintained that its retail affiliate complies with FCC rules regarding resale and is not obligated to sell DSL transport to end users at wholesale. There

is no market for the product, given that it would require purchasing ISP service from one party and DSL from another. This type of situation is inconvenient. So too, the market for DSL is competitive. And, SBC argued, this remains a “novel interpretive issue” of the sort that should not be addressed as a public interest matter.

### **ICC Analysis and Conclusion – DSL Transport**

The ICC considered that the Staff and AG arguments may have some merit. Nevertheless, it was not within the scope of this docket for the ICC to examine and decide such complex matters in the first instance. Thus, the ICC declined to do so.

## **6. Structural Separation**

Even if a determination of Section 271 compliance is rendered, AT&T argued, the ICC should require the Company to undergo structural separation as a predicate to a favorable finding on the public interest. As such, AT&T recommended that the ICC evaluate the precise form of a structural separation solution by having SBC prepare and file a preliminary implementation plan in this proceeding. By separating SBC’s wholesale and retail operations, with an appropriate capital structure that assures independent decisions, AT&T claimed, the ICC can require SBC to assure its own commercial success by offering efficient access to the existing network. According to AT&T, the ICC has the authority to require this under Section 13-508 of the Illinois PUA.

Under AT&T’s proposal, SBC argued, it would need separate itself into a network company, and a retail company that would have to obtain service from the network company. According to SBC Illinois, the proposal is at odds with the Act, not required for Section 271 approval, and had been rejected in such cases. Further, SBC asserted, the ICC has no authority, under law, to impose it.

### **ICC Analysis and Conclusion – Structural Separation**

In the final analysis, the ICC considered AT&T’s proposal inappropriate for this proceeding and it was rejected.

## **7. Waiver of Review**

Staff proposed that the ICC not endorse SBC’s Section 271 application unless the Company agrees to forgo all appeals and rehearings of the *TELRIC II Order*, the various *Line Sharing Orders*, the *TELRIC 2000 Order*, and the *State UNE Order*. In Staff’s view, a rehearing on any of these proceedings might change the required analysis in the immediate proceeding.

SBC argued that the Staff proposal was improper and lacked both legal and evidentiary support. In any event, the Company observed, the question of

rehearing is moot as regards the cited proceedings. The pursuit of judicial review, SBC asserted, is authorized by law and serves the public interest.

### **ICC Analysis and Conclusion – Waiver of Review**

The ICC found no law or other authority holding proper Staff's attempt to have SBC waive its rights to appeal or rehearing. In the ICC's view, this proposal failed on public policy grounds by stifling the statutory right to seek review.

## **E. Disputes Under State Law**

On several occasions, the parties raised issues that only concerned state law compliance. As such, the ICC considered these disputes in its public interest review.

### **1. Migration “as is” Orders**

AT&T asserted that Section 13-801(d)(6) of the Illinois PUA<sup>180</sup> requires SBC to offer carriers the ability to migrate customers “as is”, without changing the features previously used by the end user. AT&T complained that SBC has no OSS function in place to do this.

SBC contended that the statute at issue does not require the use of any particular order form, but rather refers to the substantive provisioning of the end user's existing features. Further, the statute does not indicate that the CLEC need not identify the features the end user is using. According to SBC, it satisfies Section 13-801 (d)(6) by allowing CLECs to obtain the UNE-P without changing any of the end-user's features.

### **ICC Analysis and Conclusion – Migration “as is” orders**

The ICC determined that the language of the statute did not support AT&T's position in the matter. Moreover, the novel issue it raised is better submitted to the “changed management process” and outside of this proceeding.

### **2. “All Equipment List” or AEL**

Staff noted that the ICC had ordered<sup>181</sup> SBC to post an “all equipment list” indicating what equipment can be collocated in its COs, including all equipment that is “necessary” for interconnection with its network or access to its UNEs. According to Staff, however, SBC posted a list that included equipment not known not to be eligible for collocation, and had not updated the list.

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<sup>180</sup> 220 ILCS 5/13-801(d)(6)

<sup>181</sup> *Order, Illinois Bell Telephone Company: Proposed Expansion of Collocation Tariffs*, ICC Docket No. 99-0615 (August 15, 2000)(hereafter “State Collocation Order”)

SBC contends that it need only post a list of equipment that satisfies “safety” requirements, while other restrictions attach. SBC viewed Staff’s demand to be extremely burdensome. Further, the Company’s failure to update was due to an administrative error.

### **ICC Analysis and Conclusion - AEL**

The ICC required SBC to post, and update as needed, a list of all equipment meeting the Company’s safety standards in Illinois. The ICC further determined, on the Phase II evidence, that SBC was in full compliance (having posted an Illinois Safety Compliant Equipment List (“ISCEL”) to replace its AEL for the purpose of determining what equipment is safe for collocation).

### **3. Installation of Network Interface Devices (NIDs)**

Staff alleged that SBC is not in compliance with certain ICC orders requiring it to install NIDs in all locations where needed.<sup>182</sup>

SBC asserted that it has deployed NIDs at 99% of customer locations, continues to deploy NIDs as needed, but is unaware of the remaining locations that need NIDs. SBC indicated that it is seeking a formal waiver of the NID requirement. This is nearly complete compliance with the deployment requirement, and is sufficient to satisfy the federal public interest standard. Cook County concurs with Staff.

### **ICC Analysis and Conclusion – Installation of NIDs**

In light of SBC’s timely and formal petition for waiver, the ICC declined to find the Company non-compliant. No federal obligations were at issue.

### **4. Power Cabling**

Staff noted that in a recent arbitration decision, the ICC directed SBC to provide power cabling to virtual collocation sites.<sup>183</sup> Prior to that proceeding, SBC provided power cabling to physical and virtual collocation sites, and it remained obligated to do so under the *State Collocation Order*. Staff proposed that SBC be directed to comply with the *State Collocation Order* in this respect.

SBC contended that its power cabling policies are fully consistent with state and federal law. Further, SBC is complying with the ICC’s arbitration order.

### **ICC Analysis and Conclusion – Power Cabling**

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<sup>182</sup> Staff’s argument it set forth more fully under Checklist Items 2 and 4.

<sup>183</sup> *Arbitration Decision, McLeodUSA Telecommunications Services, Inc.: Petition for Arbitration of Interconnection Rates Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, ICC Docket No. 01-0623 (January 16, 2002).

The ICC noted that this matter had resolved itself in the course of the parties' briefing. SBC Illinois made clear that any CLEC desiring to opt into the provision for power cabling in the McLeod agreement may do so.

## **5. The Performance Assurance Plan**

### **1. Standards for Review**

Most critical to the ICC's public interest review was its consideration of the Company's Performance Assurance Plan. While there is no express requirement that a BOC be subject to a post-entry performance assurance mechanism in order to gain Section 271 approval, the FCC has previously found that "the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations." Calif. 271 Order at para. 160. To this end, the FCC has identified five specific criteria as the important characteristics of an effective performance assurance plan, to wit:

- (1) Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- (2) Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- (3) A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- (4) A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and,
- (5) Reasonable assurances that the reported data is accurate. New York 271 Order, ¶ 433.

### **2. The State Perspective**

In its final Order in Docket No. 98-0555, the ICC required SBC Illinois to implement a remedy plan (the "Texas" plan) pursuant to Condition 30 of the ICC's approval of the SBC/Ameritech merger. Pursuant to this same merger condition, SBC Illinois, Staff and interested CLECs engaged in a collaborative process to address potential changes to the Texas plan. The participants agreed to modifications of the performance measurements and standards, but were unable to reach agreement with respect to the performance remedy plan. The agreed-to performance measurements and associated business rules, along with

the performance remedy plan, became effective September 12, 2000. The performance remedy plan became the subject of a separate proceeding, i.e., Docket No. 01-0120.

On July 10, 2002, the ICC issued an order in Docket No. 01-0120. This order directed SBC Illinois to implement a modified plan ("0120 Plan") that retained the structure and many elements of the original Texas plan, but was also modified in several respects. Thereafter, in its December 30, 2002, Order for Docket Nos. 98-0252 et al., the ICC stated that the 0120 Plan would remain in effect until a wholesale service quality plan is approved for purposes of Section 271. Alt Reg Order at 190, Docket No. 98-0252.

At issue in Docket No. 01-0662 was the plan SBC-Illinois proposed going forward and in support of its Section 271 application. It has been commonly referred to as the 'Compromise Plan.' SBC Illinois sought to have the ICC review, test, and approve the Compromise Plan for its effectiveness under Section 271. There was also on the table a proposal by Staff that it has titled as the "Hybrid Plan." See, Patrick, Staff Affidavit 39.01. So too, some of the parties, including Staff, contend that the ICC should adopt the 0120 plan for present purposes.

### **3. Summary of the Evidence**

SBC asserted that the Compromise Remedy Plan retains the same basic structure and elements as the 0120 Plan.<sup>184</sup> In its December 23, 2002, affidavits, SBC further indicated that the Compromise Remedy Plan complies with the five elements specified by the FCC regarding the sufficiency of a performance incentive plan to incent post-entry checklist compliance. SBC set out a number of assertions that favored approval of its Plan.

First, SBC noted the potential remedies to be paid under the Compromise Plan are more stringent than what has been approved in previous 271 applications.<sup>185</sup> A comparison shows that SBC could pay up to four times more under the Compromise Plan than under the Texas plan.<sup>186</sup> Although the Texas plan incorporates a cap on remedies of 36% of net return, the Compromise Plan specifies that the 36% is only a procedural cap at which time an inquiry would be initiated to determine if continued remedies or even additional remedies or fines are warranted.

Second, SBC indicated its performance measures and standards are the ones the CLECs agreed to in collaborative sessions.<sup>187</sup>

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<sup>184</sup> ICC Docket No. 01-0120, *Petition for Resolution of Disputed Issues Pursuant to Condition (30) of the SBC/Ameritech Merger Order* (dated July 10, 2002); as amended in *Amendatory Order* (dated July 24, 2002), and modified in *Order on Reopening* (dated Oct. 1, 2002).

<sup>185</sup> Docket No. 01-0662, Affidavit of James Ehr on behalf of SBC Illinois, dated Jan. 17, 2003 at ¶370, filed on April 10, 2003.

<sup>186</sup> *Order*, at ¶3252.

<sup>187</sup> Docket No. 01-0662, Affidavit of James Ehr on behalf of SBC Illinois, dated Jan. 17, 2003 at ¶371, filed on April 10, 2003.

Third, SBC stated that the structural elements of its Compromise Plan, are similar to those utilized in Texas, Kansas and Oklahoma and are designed to detect and sanction poor performance when it occurs.<sup>188</sup>

Fourth, SBC noted that the Compromise Plan provides for remedy payments that are self-executing enforcement mechanisms that are undertaken on a voluntary basis, and the remedy payment is automatic.<sup>189</sup>

Finally, in regard to data accuracy, SBC represented that a regional audit of performance data is sufficient, and that the initial comprehensive audit would occur eighteen months after completion of the BearingPoint audit, with subsequent audits as deemed necessary by the ICC.<sup>190</sup> In addition SBC proposed the use of mini-audits to address disputes on specific measurements or results.<sup>191</sup>

Most of the other parties argued that the performance measures agreed upon and the remedy plan ordered in Docket No. 01-0120 be used as the performance assurance plan for purposes of SBC's 271 application.

AT&T stated that the Compromise Plan's payments were set at such a low level, that they constitute a mere cost of doing business and therefore allowed SBC to degrade its wholesale service quality with little risk of paying substantial remedies after approval from the FCC. Additionally, AT&T argued, the Compromise Plan is "voluntary," and would allow SBC to refuse changes ordered by the ICC. Further, AT&T complained, the Compromise Plan termed Tier 1 payments as "liquidated damages."<sup>192</sup>

AT&T insisted that the 0120 Plan meets the FCC requirements for an effective remedy plan, while the Compromise Plan does not come close. AT&T explained how the 0120 Plan meets the FCC criteria since its remedies are significant enough to provide appropriate incentives to SBC to meet its regulatory obligations to afford nondiscriminatory access to services and facilities. AT&T also noted that the FCC requires that remedy payments pursuant to such plans must be self-executing, emphasizing that the 0120 Plan meets this requirement, while the Compromise Plan does not. AT&T articulated the FCC's goal to have remedies escalate and accelerate according to the duration and magnitude of poor performance and complimented the 0120 Plan on providing a fair framework to accomplish this goal. AT&T highlighted how the 0120 Plan meets the FCC requirements that a remedy plan be simple to implement and be based on an appropriate set of measures, and argued that the Compromise Plan would unilaterally allow SBC to create new (and generally lower) standards of performance than the approved performance measures.

WorldCom also opposed the Compromise Plan and, instead, supported the 0120 Plan. It argued that SBC, would only agree to a plan ordered by the

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<sup>188</sup> Docket No. 01-0662, Affidavit of James Ehr on behalf of SBC Illinois, dated Jan. 17, 2003 at ¶372, filed on April 10, 2003.

<sup>189</sup> *Id.* at ¶373..

<sup>190</sup> *Id.* at Attachment Z, §6.6..

<sup>191</sup> *Id.* at ¶374.

<sup>192</sup> *Order*, at ¶3262,

ICC that would require remedy payments it could tolerate as a cost of doing business. WorldCom stated that in comparison, the 01-0120 Plan has adequate remedies to motivate performance improvements, whereas the Compromise Plan did not.

In Staff's view, the Compromise Plan fails to provide four of the five key elements evaluated by the FCC. According to Staff, SBC has not proven that its plan actually places 36% of its net local return at risk; has a reasonable structure that will detect and sanction poor performance; is properly self-executing; and, provides sufficient assurance that the data used to calculate remedies is accurate. Therefore, Staff proposed that the 0120 Plan be used as the remedy plan for purposes of section 271 approval, or in the alternative, a Hybrid plan, which combines the 0120 Plan with a few features of the Compromise Plan. Staff asserted that the Compromise Plan would fail to prevent backsliding in a post-271 approval environment; that the Compromise Plan introduces changes to the 0120 Plan that negatively impact findings regarding issues that were fully litigated in that docket; and that the Compromise Plan introduces many language changes that are un-supported by the affidavits.

The major drawbacks of the Compromise Plan identified by Staff were the removal of measure weightings, introduction of the index value, and changes to PM definitions because of the "ceilings and floors" proposal. In addition, Staff raised issues with the manner in which SBC intends to implement certain features of the Compromise Plan to all other remedy plans it offers in Illinois. Because SBC implements a number of remedy plans in Illinois, Staff requested that SBC make commitments in addition to providing a remedy plan, to ensure that certain features are applied to all CLECs. Staff recommended that SBC commit to providing: an annual audit; a mini-audit; a procedure that allows CLECs to "opt-in" to current remedy plans; only one Tier 2 plan; offer only one remedy plan to CLECs after its current interconnection agreement ends; and to continue participating in the six-month collaborative process. In addition, Staff recommended that the ICC determine the dollar value of SBC annual threshold of 36%, instead of SBC making that determination, that a proceeding commence 36 months from the date of Order in Docket No. 01-0662 so as to determine the duration of performance assurance plan(s) offered by SBC, and that the 0120 Plan should continue as a part of SBC's Alternative Regulation Plan.<sup>193</sup>

In response, SBC indicated that the remedy payments under 0120 Plan were approximately ten times higher than what it would have paid under the Texas plan. Where Staff had requested a commitment that only one Tier 2 payment be used, SBC stated that it would provide Staff calculations showing that it chose the higher of two calculation methodologies.<sup>194</sup> As to Staff's position on the duration of the performance assurance plan, SBC stated that it would be willing to enter negotiations to discuss changes, after thirty-six months. In responding to Staff's commitment that the opt-in procedure apply to all plans and all CLECs, SBC stated that it would post an accessible letter informing CLECs of the remedy plans available in Illinois. As to Staff's proposal that the Commission

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<sup>193</sup> See Order, at ¶¶3264-3455..

<sup>194</sup> Order, at ¶¶3476-77.

determine the amount of the annual threshold, SBC would not agree, indicating that the amount is easily verifiable through public records.<sup>195</sup>

## **6. ICC Analysis and Conclusion**

At the outset of its detailed review, the ICC required that certain modifications be made to the Compromise Plan, to wit: removal of the floors and ceilings feature proposed by SBC; allowance for a future determination of whether a regional audit should be performed; a comprehensive audit 16 months after BearingPoint's work was completed; SBC would pay the larger of two Tier 2 plans; a review proceeding was to commence 30 months from the date of the Order in Docket No. 01-0662; and further, SBC's Alternative Regulation Plan was to be modified to indicate that the now Commission Approved 271 Plan as a remedy plan available under state law. In further review, the ICC found that this modified version of the Compromise Plan (i.e. the "Commission Approved 271 Plan") met the five FCC criteria as indicated in the following analysis.

### FCC Element Number 1: potential Liability that provides a meaningful and significant incentive to comply with the designated performance measures

The ICC found that the Commission Approved 271 Plan provides a meaningful incentive for SBC to provide wholesale service to its competitors at the levels required by the performance measures. It is designed to assess remedies where there is sufficient evidence of a disparity between wholesale performance and the applicable standard, to increase payments as performance worsens, and to reduce payments as performance improves. That it provides the proper incentive to maintain a high level of performance and institutes improvements should performance fall below the agreed-upon standards. The Commission Approved 271 Plan contains a two- tiered payment structure. Under that plan, Tier 1 damages are paid to the CLECs, and Tier 2 assessments are paid to the State.

The keystone of the Commission Approved 271 Plan is that Tier 1 payments are paid based on an "index value." The index value is a measure of the Companies performance during the previous 12 month period. The amounts SBC will pay are based on the index value for the previous 12 month period. Payment amounts are defined by a range of index values, such as 80% to 86%, and 86% to 92%. As the index value drops from one range of index values to a lower range (i.e. from 88% to 84%), SBC's performance has declined, and the payment amounts to CLECs will increase. Commensurately, if the index value increases (i.e. moving from 77% to 90%) SBC's overall performance has improved and the payment amounts to CLECs will decrease.<sup>196</sup> In addition, remedy amounts continue to "escalate" if a performance measure standard is

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<sup>195</sup> ICC Docket No. 01-0662, SBC Response to Staff Comments on Remedy Plan, at 14.

<sup>196</sup> See, Affidavit of James Ehr on behalf of SBC Illinois, dated Jan. 17, 2003, Attachment Z, Table 1, (filed April 10, 2003).

missed in consecutive months. Unlike other plans used in Illinois, under the Commission Approved 271 Plan, the remedy amounts incurred for failure to meet a performance measure will not decrease until the applicable standard is met for 3 consecutive months.

In addition, an annual threshold is to be recalculated annually using publicly available FCC ARMIS (“Automated Reporting Management Information System”) reporting data and is to be 36% of the company’s local net return. If the annual threshold is reached, the ICC would institute proceedings to determine the appropriate action. The “proceeding” triggered by reaching the threshold would be expected to determine if the threshold has been reached due to inadequate service provided by SBC, or due to deficiencies within the remedy plan itself that cause inappropriate remedy amounts to be paid given the level of service provided by SBC to CLECs. In the situation where it is determined that the cap has been reached due to inadequate performance by SBC, additional remedies could be assessed over and above the threshold amount (as opposed to a “hard” cap that limits the total remedies). Likewise, if the remedy cap has been reached while service provided to CLECs by SBC has been adequate, the ICC can modify the remedy plan to provide for remedy payments that are more appropriate for SBC’s level of performance.

FCC Element Number 2: clearly-articulated measures and standards.

The agreed-upon measurements track performance for a full range of services. The Compromise Plan does not change the measures or standards in the current business rules, and there is no dispute regarding the performance measures and standards proposed by SBC. These measures and standards, and the rules for calculating them, were agreed upon in a *Joint Petition for Resolution of Disputed issues Pursuant to Condition 30 of the SBC/Ameritech Merger Order* (at ¶12), and subsequently modified through the subsequent six-month collaborative processes.

FCC Element Number 3: a reasonable structure to detect and sanction poor performance.

The Commission Approved 271 Plan is designed to: (1) assess remedies where there is sufficient evidence of a disparity between wholesale performance and the applicable standard; (2) to increase payments as performance worsens; and (3) to reduce payments as performance improves. This is the appropriate structure in the ICC’s view.<sup>197</sup>

Overall, the basic structural elements of the Commission Approved 271 Plan is the same as the remedy plan approved in Docket No. 01-0120, which in turn is based on the same structure approved by the FCC in the Texas Order (¶ 426), the Kansas & Oklahoma Order (¶ 276) and the Arkansas & Missouri Order (¶¶ 129-130). Like those plans, the basic operational scheme is that each month SBC’s actual performance is mathematically determined for each

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<sup>197</sup> Order, at ¶3548.

individual performance measurement result. Each of these results is then compared to an objective standard for that measurement, using accepted statistical techniques. If the comparison shows that SBC did not provide the required level of service, remedy payments will be calculated pursuant to the methodology detailed in the performance remedy plan.<sup>198</sup>

The Commission Approved 271 Plan uses statistical analysis to determine when remedies are to be paid by identifying whether the size and number of performance shortfalls are significant, or small enough so as to be attributed to the random variation inherent in actual wholesale and retail performance. Furthermore, the Commission Approved 271 Plan makes payments based on an “index value”, which is based on overall performance over a twelve-month period, as discussed above. Payments increase, progressively, as performance pass rate falls to the 86-92 percent level; the 80-86 percent level; the 74-80 percent level, and below the 74 percent level. In the each of the next two years, the payment amounts decrease, for performance measures that are missed for two months, whereas the payment amounts do not change over the next three years for misses that continue for three or more months, or if the index value is below 80%.

#### FCC Element Number 4: the plan is self-executing

Payments occur automatically without any CLEC initiative or ICC action. So too, payments are delivered via check or credit against outstanding charges the CLEC owes SBC, provided the charges is not outstanding for more than ninety days. Additionally, CLECs must inform SBC if they choose to receive payments by check. The ICC did not believe that this would make the plan any less “self-executing” simply because it requires CLECs to submit payment information if they desire payment by check.

#### FCC Element Number 5: reasonable assurance that the reported data is accurate

SBC’s performance measurements are being assessed as part of BearingPoint’s ongoing third-party OSS testing. For audits going forward, an initial audit will commence 16 months after completion of BearingPoint audit, and subsequent audits will be determined by the ICC. In addition, at some point in the future, the ICC will determine whether a regional audit is in this state’s best interest. The Commission Approved 271 Plan also allows a CLEC to request an independent “mini-audit” to address disputes on specific measurements or results.

To be sure, SBC Illinois accepted each and all of the ICC’s modifications to its proposed Compromise Plan. Attachment A to the ICC’s Final Order in Docket No. 01-0662 contains SBC Illinois’ submission of the Commission

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<sup>198</sup> Order, at ¶3549-50.

Approved 271 Plan. We were assured that SBC Illinois is tendering this Plan to the FCC.

As it stands, the Commission Approved 271 Plan, along with other oversight and enforcement authority of the ICC and the FCC, should be recognized by the FCC in its public interest deliberations as additional support and incentive for SBC continuing to comply with the checklist requirements of the 1996 Act.<sup>199</sup>

## **7. ICC Overall Review Under the Public Interest**

In the investigative proceeding, the parties provided much debate as to the role of the ICC in considering the “public interest” concern that was officially delegated to the FCC under Section 271 (d) of the Telecommunications Act. As it evolved, the ICC provided Staff and all parties with the full opportunity to present their views, raise issues, and further set out any proposals they deemed relevant on the matter. In this way, the ICC was able to discern whether there were any circumstances present that, if left un-remedied, would prevent its support of SBC Illinois’ section 271 application.

While many of the state law matters and other proposals were addressed in the Phase I Order, the ICC’s assessment of the Company’s Performance Assurance Plan, SBC Illinois’ response to a number of remedial actions that were deemed necessary to complete checklist compliance, as well as the essential review of both the Company’s performance data and OSS functioning were brought to successful conclusion at the end of Phase II.

On review of the record as a whole, the ICC turned to the high level standard that governs the outcome of its investigative proceeding, i.e., whether SBC Illinois has demonstrated substantial and sufficient compliance with the statutory requirements of Section 271 of the 1996 Act such that, the local telephone markets in Illinois are fully and irreversibly open to competition.

While the public interest test is indeed separate from the fourteen-point checklist, the FCC itself recognizes that satisfaction of these requirements is well subsumed under its umbrella. At the close of our Phase I review, the Commission determined that, unless shown otherwise in the next phase of this proceeding, SBC Illinois was compliant with items (iii), (vii), (viii), (ix), (xi), (xii) (xiii) and (xiv) of the Competitive Checklist. The record developed in Phase II established that, in addition to the above, the Company satisfies the requirements set out under checklist items (i), (v), (vi), and (x). The relatively few shortcomings that remained to be addressed with respect to checklist items (ii) and (iv) and the Company’s resolve and its plans and programs for addressing the relatively few shortcomings was a prominent factor in the review. So too, the ICC deemed it important to the public interest that it maintain strong and

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<sup>199</sup> See Order, at ¶3539-58.

sustained oversight and will vigorously pursue any enforcement actions it deems necessary in any situation that comes before it.

Further embraced under the public interest standard is the Company's satisfaction of the Track A eligibility requirements pursuant to Section 271 (C) (1) (A), that the showings in this proceeding show as beyond dispute. The presence of competition in Illinois local markets is well-evident. It is also well settled that consumer benefits flow from competition in all telecommunications markets.

In the final analysis, the record in Docket No. 01-0662 and the ICC's continued oversight of pending activities, persuaded the ICC that the public interest, convenience and necessity in Illinois, is served by having SBC Illinois be allowed to compete in the long distance market. This outcome will surely bring new benefits and choice to the Illinois public at large.

This concludes the ICC's report to the FCC in the matter of SBC Illinois' application for Section 271 authority.